TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 251

JAMES STEWART & CO., INC., APPELLANT,

vs.

KATHERINE SADRAKULA, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF NICHOLAS SADRAKULA, DECEASED

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED AUGUST 1, 1939.

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Court of Appeals

OF THE STATE OF NEW YORK.

KATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Plaintiff-Respondent,

against

JAMES STEWART & CO., INC.,
Defendant-Appellant.

Statement Under Rule 234.

The summons and complaint herein were served on January 16, 1936. An amended complaint was served on February 10, 1936. Issue was joined by the service of defendant's answer to the amended complaint on February 20, 1936.

Plaintiff appeared by Jenkins, Stewart & Fixler, for whom McCarthy, Fixler & Stewart were later substituted. Defendant appeared by Frederick Mellor.

There has been no change of parties or of attorneys herein except as stated.

4 **Notice of Appeal to Appellate Division.**

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

KATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,

Plaintiff,

against

5

JAMES STEWART & CO., INC.,

Defendant.

Sirs:

PLEASE TAKE NOTICE that the defendant above named hereby appeals to the Supreme Court, Appellate Division, Second Department, from the judgment entered in the County Clerk's office of Kings County on the 24th day of November, 1937, for the sum of Twenty-six thousand one hundred ninety-seven and 08/100 ($26,197.08) Dollars in favor of the plaintiff and against the defendant,

6 and the said defendant hereby appeals from each

and every part of said judgment as well as the whole thereof.

Dated, New York, December 2nd, 1937.

Yours, &c.,

FREDERICK MELLOR,
Attorney for Defendant,
Office & P. O. Address,
60 John Street,
Borough of Manhattan,
City of New York.

8

To:

McCARTHY, FIXLER & STEWART, Esqs.,
Attorneys for Plaintiff,
165 Broadway,
Borough of Manhattan,
City of New York.

COUNTY CLERK OF KINGS COUNTY.

9

10 **Summons.**

SUPREME COURT,

COUNTY OF KINGS.

KATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Plaintiff,

against

JAMES STEWART & CO., INC., and
R. E. CARRICK & CO., INC.,
11 Defendants.

Plaintiff designates Kings County as the place of trial.

To the above named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorneys within 20 days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

12 Dated, January 13th, 1936.

JENKINS, STEWART & FIXLER,
Attorneys for Plaintiff.
Office and Post Office Address,
165 Broadway,
Borough of Manhattan,
City of New York.

Amended Complaint.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

[SAME TITLE:]

Plaintiff, for her amended complaint, respectfully alleges:

FIRST: Upon information and belief the defendants are domestic corporations duly organized and existing under and by virtue of the Laws of the State of New York, maintaining offices in the City of New York.

SECOND: That on or about the 24th day of October, 1935, Nicholas Sadrakula was employed by the United Hoisting Company, Inc., as a rigger in and about a building in the course of construction at Church and Vesey Streets, in the Borough of Manhattan, City and State of New York, which property was owned by the U. S. Government and upon which was being constructed a Federal building.

THIRD: Upon information and belief the defendant, James Stewart & Co., Inc., was the general contractor for the construction of the aforesaid building, and on or about August 15, 1935, it entered into an agreement with the United Hoisting Co., Inc., for the installation of a concrete mixing and hoisting plant in the western section of said building.

FOURTH: That upon information and belief defendant R. E. Carrick & Co., Inc., was employed by the defendant James Stewart & Co., Inc., to supervise the installation of said hoisting plant and to do the actual concrete work for the general contractor.

FIFTH: Upon information and belief upon the day in question guide rails of said building plant had been duly constructed up to the sixth floor of said western building and the motor to be used for hoisting purposes was being installed on the first floor, and it was on this floor that deceased was working at the time of this accident.

SIXTH: That on said date the deceased was working at, near or upon said guide rails on the first floor and was caused to fall from said place to the basement floor below, sustaining serious injuries thereby, as a result of which he died the same day.

SEVENTH: That the fall and resulting death was caused solely by the negligence of the defendants in failing to provide deceased with a safe place to work, in failing to properly plank over, cover, guard and protect the shaftways, wells or other openings on the floor in question, particularly where the deceased was working at the time; the defendants were otherwise negligent in failing to comply with the provisions of the Labor Law and such other provisions of law applicable in the premises.

EIGHTH: That on or about the 1st day of November, 1935, Limited Letters of Administration of the goods, chattels and credits which were of

icholas Sadrakula, deceased, were issued to the laintiff herein and plaintiff duly qualified and en- ered upon her duties as such administratrix of id estate and is now acting as such. That plain- ff's intestate left surviving him as next of kin, atherine Sadrakula, his wife, the administratrix erein, Edward Sadrakula, aged 18, a son and tanley Sadrakula, aged 16, a son.

NINTH: That the said next of kin have been amaged to the extent of One Hundred Thousand $100,000) Dollars.

WHEREFORE, plaintiff demands judgment in the im of One Hundred Thousand ($100,000) Dollars ogether with the costs and disbursements of this ction. 20

JENKINS, STEWART & FIXLER,
Attorneys for Plaintiff,
Office & P. O. Address,
165 Broadway,
Borough of Manhattan,
City of New York.

(Verified January 29th, 1936.)

21

22 **Answer to Amended Complaint.**

SUPREME COURT.

COUNTY OF KINGS.

[SAME TITLE.]

The defendant, James Stewart & Co., Inc., by its attorney, Frederick Mellor, answering the amended complaint of the plaintiff herein:

I. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "First" of said amended complaint, except admits that this defend-
23 ant is a domestic corporation.

II. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "Second" of the complaint, except admits that the Federal Office Building was being erected at Church and Vesey Streets, New York City.

III. Upon information and belief, denies each and every allegation contained in paragraph "Fourth" of the complaint, except admits that this defendant entered into a contract with R. E. Carrick & Co., Inc., whereby said R. E. Carrick & Co.,
24 Inc., was to supervise and direct the furnishing and providing of all labor, work and materials necessary or required to do the concrete and cement work required in the construction of the Federal Office Building.

IV. Upon information and belief, denies each and every allegation contained in paragraphs "Fifth," "Sixth" and "Ninth" of the complaint.

V. Upon information and belief, denies each and every allegation contained in paragraph "Seventh" of the complaint, insofar as said allegations relate to this defendant.

VI. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "Eighth" of the complaint herein.

FOR A SEPARATE AND DISTINCT DEFENSE, DEFENDANT, JAMES STEWART & CO., INC., ALLEGES:

VII. That the injury alleged to have resulted in the death of the plaintiff's intestate, was caused by the negligence of said plaintiff's intestate in failing to observe apparent dangers and to exercise reasonable care for his own safety and otherwise through his negligent conduct under the circumstances presented to him.

WHEREFORE defendant demands judgment dismissing the complaint of the plaintiff herein, together with the costs and disbursements of this action.

FREDERICK MELLOR,
Attorney for Defendant,
James Stewart & Co., Inc.,
60 John Street,
Borough of Manhattan,
City of New York.

(Verified February 18, 1936.)

28 **Plaintiff's Bill of Particulars.**

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

[SAME TITLE.]

Plaintiff, for her bill of particulars herein, alleges as follows:

1. The plaintiff's intestate was working on the first floor, close to the hod hoist rails which were near that portion of the building 29 which would be the corner of Vesey Street and West Broadway, N. Y. C.

2. Deceased was working lawfully on the first floor and he was engaged at the time of his accident in the installation of the apparatus of the hod hoist, including the bringing up of a concrete bucket. This work took him close to the hod hoist rails which had theretofore been partially installed and extended up to the fifth or sixth floors.

3. On information and belief, the first floor, particularly that portion thereof from which the deceased fell, was under the joint super- 30 vision of both of the above defendants.

4. The answer to demand "3" is also an answer to demand "1."

5. Guide rails are part of the construction of a hod hoist shaftway and it is by means of these rails that the hoist is guided in its ascent and descent.

6. The guide rails referred to were installed by the employees of the United Hoisting Company, whose principal place of business is located at 136th Street and Locust Avenue, in the Borough of Bronx, City of New York.

7. The deceased was within a few feet of the guide rails at the time he fell.

8. At the time of the accident, the guide rails were not upon the floor; they projected up through the first floor and continued upward for several floors above.

9. The distance that the deceased fell was 32
approximately 40 feet.

10. On information and belief, the deceased either fell through the hoist shaftway or through spaces in the floor that existed on every side of the shaftway; his body came against the concrete or hard materialed portion of the floor of the basement on the West Broadway side of the hod hoist and at a few feet from its base; located a few feet away was a sand pile.

11. The defendant, R. E. Carrick & Co., Inc., was negligent in the following respects:

(a) In failing to comply with the laws and 33
customs in building construction, which required that company, as supervisor over the installation of the apparatus and hoisting materials of the United Hoisting Company, to barricade, safeguard and otherwise protect employees of the latter company.

(b) In failing to supply the necessary material to safeguard the floor upon which the deceased was located at the time he fell.

(c) In failing to plank over the spaces of the floor in which the deceased fell.

(d) In failing to place barriers or barricades around the hod hoisting shaftway.

(e) In failing to take proper supervision over the progress of the work for the protection of the deceased and other persons necessarily engaged in the installation of the hod hoisting apparatus.

(f) In failing to remove from dangerous places at or near the place where the deceased was required to be, all sorts of loose planks, old ladders, beams and other materials.

(g) In permitting employees of the R. E. Carrick & Co., Inc., to throw about and carelessly place all sorts of loose beams, ladders, planks and other material where they were calculated to cause obstruction to those working in that neighborhood of the shaftway and to present seemingly safe ways to move around, whereas in fact, they were inherently unsafe, untrustworthy and in the nature of traps.

(h) In failing to exercise any care whatsoever in R. E. Carrick & Co.'s supervision of the progress of the work on the first floor where deceased was necessarily working at the time of the accident; more particularly, in that Robert E. Carrick, President of the said defendant company and one Mathew Salterelli, Superin-

tendent of said defendant, failed completely to actively supervise the progress of the work and to provide safeguards for the benefit of deceased and other workers in his vicinity.

(i) The said defendant, R. E. Carrick & Co., Inc., and the two aforesaid employees of that company were further negligent, careless and reckless in that they ordered the employees of the United Hoisting Company to proceed with their work at a time when said defendant and its said employees knew that the conditions under which said work was to be performed were hazardous, dangerous and contrary to the 38
general provisions of law and customs of the building trade.

12. The specific laws to which the plaintiff refers, are Sections 200, 240, 241 and 241a, and also Section 196 of the Code of Ordinances of the City of New York, entitled "Protection of Floor Openings" and such other amendatory acts of said various laws and ordinances.

13. The deceased was a strong, healthy, able bodied man of excellent physical and mental condition. At the time of his death at the age of 40 years, he was earning an average of forty ($40.00) Dollars a week and frequently over-
time; his expectancy of life can be tabulated 39
from any of the mortality tables by the defendant as well as by the plaintiff. The plaintiff, however, will claim that his life promised to be a long one because of his physical condition and would estimate that he would have lived three score and ten years, which would mean that his salary for that period of time would

amount to Sixty Thousand ($60,000) Dollars without overtime. Furthermore, at the time of his accident, he had risen from the position of an ordinary workman and had become a "rigger" which is a highly specialized form of mechanical work.

With reasonable expectancy, a man of his age and ability would have risen to a higher position in the course of time with an increase in his income.

The deceased left a wife and two minor children, as more particularly appears on the face of the complaint. An additional item of expense was his funeral, which cost Six Hundred Twenty-five ($625.00) Dollars.

14. The answer to the 13th demand constitutes also an adequate answer for demand #14.

15. Limited Letters of Administration were issued by the Surrogate of Kings County on or about the 1st day of November, 1935; neither the plaintiff's attorneys nor the plaintiff have a copy of these letters, but defendant can easily procure a copy of them from the office of the Surrogate of Kings County.

Dated: New York, N. Y., May 7th, 1936.

JENKINS, STEWART & FIXLER,
Attorneys for Plaintiff,
165 Broadway,
Borough of Manhattan,
City of New York.

(Verified May 8th, 1936.)

Judgment Appealed From.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

[SAME TITLE.]

The issues in the above entitled action having duly come on for trial before Mr. Justice Harry E. Lewis and a jury at Trial Term, Part 8 of the Supreme Court of the State of New York, Kings County, on the 9th day of November, 1937, and the action having been discontinued without costs, upon consent, as against the defendant, R. E. Carrick & Co., Inc., and having been duly severed and continued as against defendant, James Stewart & Co., Inc., and at the end of the entire case both sides having waived the jury and submitted all issues of law and fact to the Trial Judge for determination, and findings of fact and conclusions of law having been duly waived, and the Court having rendered and filed a decision in favor of plaintiff,

NOW, on motion of Herman J. McCarthy, of counsel for the plaintiff, it is

ADJUDGED, that Katherine Sadrakula, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased, residing at 148 North 9th Street, Borough of Brooklyn, City and State of New York, recover of the defendant, James Stewart & Co., Inc., of 230 Park Avenue, Borough of Manhattan, City of New York, the sum of $23,125.00, together with interest of $2,890.63, together with costs and disbursements in the sum of $181.45, duly taxed, making a total of $26,197.08, and that plaintiff have execution therefor.

Dated: New York, November 24th, 1937.

JOHN N. HARMAN,
Clerk.

46 **Case and Exceptions.**

NEW YORK SUPREME COURT,

KINGS COUNTY.

TRIAL TERM—PART VIII.

KATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Plaintiff,
against
47 JAMES STEWART & CO., INC., and R. E. CARRICK & CO., INC.,
Defendants.

Before:
HON. HARRY E. LEWIS, *Justice*, and a Jury.

Brooklyn, N. Y., November 8, 1937.

APPEARANCES:

HERMAN J. MCCARTHY, Esq., for the plaintiff.

CLARENCE E. MELLEN, Esq., for the defendant James Stewart & Co., Inc.

48 WILLIAM GOLDMAN, Esq., for the defendant R. E. Carrick & Co., Inc.

(A jury was duly selected, impaneled and sworn.)

(Mr. McCarthy, for the plaintiff, made an opening statement to the jury.)

Mr. Goldman: If your Honor please, since the opening statement was taken down, on behalf of the defendant Carriek I now move to dismiss the complaint upon the ground that it appears by the opening statement itself that no cause of action was pled or stated as against the defendant Carrick, and I call your Honor's attention to the cases cited on pages 21 and 22.

The Court: What do you say, Mr. McCarthy?

Mr. McCarthy: As I explained to your Honor in chambers, I had nothing to do with the preparation of these pleadings. I concede that our case against Carrick is far-fetched but——

The Court: Even under the statute it said, "All contractors and owners."

Mr. McCarthy: That is right.

The Court: Do you want to discontinue as to him?

Mr. McCarthy: I am perfectly willing, if Mr. Goldman will be so gracious, and so that the jury understands that this is no fault or error on our part.

The Court: Oh, no. Discontinued without costs as to the defendant Carrick.

(Mr. Mellen, for the defendant Stewart, then made an opening statement to the jury.)

Mr. McCarthy: Your Honor, I wish to read a stipulation between the parties: "It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that upon the trial of this action it will be conceded that:

"(1) The United States Government by and with the consent of the legislature of the State of

New York, acquired title to the land or property referred to in paragraph two of the amended complaint herein, located in the Borough of Manhattan, City, County and State of New York, bounded on the north by Barclay Street, on the east by Church Street, on the south by Vesey Street, and on the west by West Broadway, by purchase at private sale in separate parcels during the months of September, October and November, 1931, for the purpose of using the same as the site for a post office and office building necessary for the use of the Government of the United States, and that
53 an agent, authorized under the hand and seal of the head of an executive department of the Government of the United States, caused to be filed and recorded in the office of the Secretary of the State of New York certified copies of the record or transfer to the United States of the property herein described, together with copies and descriptions of such lands by metes and bounds without a certificate of the Attorney-General of the United States that the United States was in possession of the land hereinbefore described on December 26, 1935.

"(2) The deceased, Nicholas Sadrakula, died on October 24, 1935, as a result of injuries received by him that day, when he fell to the lowest or sub-
54 basement floor from the floor immediately above it known and referred to as the basement floor.

"(3) The fair and reasonable value of the funeral expenses incurred by the estate was $625."

The Court: Is the date of the accident the date of death, October 24th?

Mr. McCarthy: Yes, the same day, sir.

KATHERINE SADRAKULA, 148 North 9th Street, Borough of Brooklyn, City of New York, the plaintiff, called as a witness in her own behalf, after being duly sworn, testified as follows:

Direct examination by Mr. McCarthy.

Q. Mrs. Sadrakula, compose yourself and speak loudly so that not only I, but all these jurors can hear you, please. Try to keep your voice up for me. You are the widow of Nicholas Sadrakula, is that right? A. Yes.

Q. And you are the plaintiff in this action, is that so? 56

The Court: We know that.

Mr. McCarthy: That is right. Now I offer in evidence, your Honor, copy of certificates, the letters of administration issued out of the Surrogate's Court, Kings County.

Mr. Mellen: I will concede them.

The Court: Conceded that they were issued.

Q. At the time of your husband's death, October 24, 1935, Mrs. Sadrakula, how old was he?

By the Court.

Q. How old was your husband when he died? A. Thirty-nine. 57

By Mr. McCarthy.

Q. At that time how old were you? A. Thirty-nine. My husband thirty-nine ten months. I am thirty-nine.

59 *Katherine Sadrakula—Plaintiff—Direct.*

By the Court.

Q. How old were you when he died? A. Thirty-nine.

By Mr. McCarthy.

Q. Both thirty-nine, is that right? A. Yes.

Q. Did you and your husband have any children? A. Two.

By the Court.

Q. Boys or girls? A. Boys.

58 Q. What is the name of the oldest? A. Edward.

Q. How old was he? A. Eighteen.

Q. And the next one? A. Sixteen.

Q. What is the other boy's name? A. Stanley.

Q. Eighteen and sixteen? A. Yes.

The Court: All right.

By Mr. McCarthy.

Q. Was Stanley going to school at that time? A. Yes.

Q. At the time of your husband's death? A. Yes.

Q. What school was he attending? A. Some——

Q. Central Needle Trades High School? A. Yes, trade school.

60 Q. Day school. The other boy Edward, he was not going to school at that time? A. No.

Q. He was not working either? A. No.

By the Court.

Q. Was he working? A. No, he was not working at the time my husband died.

By Mr. McCarthy.

Q. How long had you and your husband been married at the time in October, 1935? A. Nineteen years and four months.

Q. You were married here in Brooklyn, were you? A. Yes, this time.

Q. You had continued to reside with your husband during those nineteen years and four months? A. What?

Q. Lived together, did you? A. Yes.

The Court: Use the monosyllabic words if you can. 62

Q. He had supported you during this time, had he? A. Yes.

Q. Maintained the house for the boys and yourself? A. Yes.

Q. And describe your husband's person to us—

By the Court.

Q. Was he a healthy man? A. Yes, he was healthy man.

Q. Was he sick at all? A. Never sick, he was never sick for nineteen years and four months for one day.

The Court: He was not sick during the time they were married. 63

By Mr. McCarthy.

Q. Describe his attitude or his temperament, his disposition, was he easy to get along with or was he quarrelsome?

The Court: That wouldn't make any difference.

64 *Katherine Sadrakula—Plaintiff—Direct.*

Mr. McCarthy: I think it might. It is one of the inferences.

The Court: No, that does not go to the question of compensatory damages.

Mr. McCarthy: No, no. Just one of the inferences.

The Court: I think not.

Mr. McCarthy: May I respectfully except?

The Court: Surely.

Q. During this time that you were married and living with your husband, say the year before his
65 death, how much money did he give you and bring home to you? A. Thirty-five, forty dollars.

Q. Thirty-five or forty dollars a week? A. A week, yes.

Q. Was that every week or was it sometimes more, sometimes less? A. Before.

Q. That was some time before? A. Yes.

Q. About two years before his death that is, in 1933, what was his weekly delivery of money to you? How much money did he give you every week two years before his death? A. Thirty-four, forty, sometimes more, fifty, before, before.

Q. I know, but just a question of how long be-
fore; do you remember what year that was? A.
66 Yes, in other years he make fifty, sixty dollars.

Q. Now, out of that money that he brought home, what did you do? Did you run the house with it? A. Yes.

Q. Did he take any money for himself?

The Court: Did she say how much he brought home?

Mr. McCarthy: Thirty-five to forty.

By the Court.

Q. Thirty-five to forty dollars a week? A. Yes.

By Mr. McCarthy.

Q. Did he take some of that money that he brought home? A. Yes, he take dollar a day.

Q. Dollar a day? A. Yes.

Q. Describe, if you will, the habits of your husband, was he a man who stayed home at night? A. Yes.

Q. Or was he a man who went out? A. He stayed home in the night, yes, never go no place, go with me. 68

The Court: We will assume he didn't belong to clubs.

Mr. McCarthy: That is what she told me.

Q. Did Stanley go to school during day or evening? A. My son?

Q. Yes. A. Yes, daytime.

Q. Not an evening school? A. No, daytime.

Mr. Mellen: No questions.

The Court: Have you got a stipulation here that Stewart was the general contractor on the job?

Mr. Mellen: It is admitted by the pleadings. There is no dispute about it. 69

70 *Anthony F. Moran—For Plaintiff—Direct.*

ANTHONY F. MORAN, 150 Kipp Avenue, Hasbrouck Heights, New Jersey, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. McCarthy.

Q. Mr. Moran, what is your business at the present time? A. Superintendent for the United Hoisting Company.

Q. United Hoisting? A. Yes, sir.

Q. What was your job during the year 1935? A. Same thing.

71 Q. And were you in charge of supervising the work of one Sadrakula, the man who died? A. Yes, sir.

By the Court.

Q. Did he work for your company? A. Yes, sir.

By Mr. McCarthy.

Q. How long had you known him? A. Thirteen years.

Q. How long had he worked for your company? A. Ten years.

Q. Describe the physical appearance of Nicholas Sadrakula, please. A. He was a man that weighed
72 about 190.

Q. How much at the time of his death? A. About 190 to 195.

Q. How tall was he? A. About five foot eight and a half.

Q. Was he an active man? A. Very active.

Q. Describe his capacity as a workman, if you will, please. A. He never lost a day while he was under me.

Q. What was his job with the company? A. Foreman and rigger.

Q. Particularly in reference to this job at the Vesey Street Federal Office Building, what was his capacity? A. Same thing.

Q. Was he in charge when you were away? A. Yes, sir.

Q. During the year preceding the day of his death, do you know what his average weekly earnings were? A. Thirty-five to forty on the average, that was single time.

Q. Excuse me. A. That was single time.

Q. Were there any compensations for overtime? 74
A. Double time for overtime.

Q. That was based upon what basic rate of pay? A. Seventy cents an hour at that time.

Q. That was in 1935? A. Yes, sir.

Q. Has there been any change in the basic rate of pay of a foreman and rigger from that time to this? A. $1.20 to-day.

Q. That is in the trade, is that right? A. Yes, sir.

Q. You have described the physical appearance of Sadrakula. Will you describe for us——

By the Court.

Q. Did you say $1.20 a day? A. $1.20, to-day. 75

By Mr. McCarthy.

Q. Will you describe his temperament, disposition if you will, spirits, as you last saw him? A. Very quiet, mild-mannered man. Devoted all his time to his work.

Q. Will you speak up loudly so that all the jurors can hear you? A. Very quiet, mild-mannered man, devoted entirely to his work.

76 *Anthony F. Moran—For Plaintiff—Direct.*

Q. Can you tell us exactly when was the last time that you had seen him before his death? A. I saw him that morning between eight and nine.

Q. Where did you see him? A. On the basement floor at the Federal Building.

Q. When you refer to the basement floor, do you mean the lowest floor or the floor above the lowest floor? A. No, the floor in line with the street level on West Broadway side.

By the Court.

Q. That is one floor above the basement? A. 77 Yes.

By Mr. McCarthy.

Q. In other words, the lowest floor of this building, we might stipulate, would be called the sub-basement floor.

Mr. Mellen: Yes.

Q. And the floor above where the bin was placed was the basement floor, is that right, sir? A. Yes.

Mr. Mellen: That is right, sir.

The Court: The basement is just the first story above?

Mr. McCarthy: The first story above. 78 Have you got the progress sheets?

Mr. Mellen: Here are some progress sheets that were kept by somebody on the job. There is no attempt made in these to say that the man who kept them actually knew of the condition.

The Court: They are not offered yet, so I don't know.

Mr. McCarthy: I have not offered them in evidence.

The Court: I said that.

By Mr. McCarthy,

Q. Mr. Moran, how long before the day of the accident to Sadrakula had you proceeded to install the equipment which had been ordered by Stewart? A. The day before.

Q. The day before? A. Yes.

Q. Did anyone point out to you the place where the guide rails were to go? A. Yes.

Q. Who did that? A. Matty Sartelli. 80

Q. Is he in court? A. Yes.

Mr. McCarthy: Matty Sartelli.

(A man arose.)

Q. Did you come in contact with a man by the name of Finnegan at that time? A. Yes.

Q. You knew Mr. Finnegan? A. Yes.

Q. Had known him a number of years? A. Yes.

Q. He is the general superintendent of the defendant James Stewart & Company? A. Yes.

Mr. Mellen: I object to that characterization as leading, if your Honor please. I don't know what "general" superintendent means. He was superintendent on that par- 81 ticular job.

Mr. McCarthy: That is all that I meant.

The Court: Well, strike out "general superintendent."

Q. The superintendent in charge of that particular job? A. Yes.

By the Court.

Q. Who was superintendent for Stewart? A. John Finnegan.

By Mr. McCarthy.

Q. You saw him around the building at the time that you were proceeding with the installation of your conveyor? A. Yes, sir.

Q. Were you familiar with the progress which had been made by your crew after you left on the day of October 24th? A. I left them at 9 o'clock. I didn't get back there again until the afternoon
83 around four.

Q. By that time the accident had happened? A. By that time the accident had happened.

By the Court.

Q. Tell me so the jury will understand: What were your men to do there on this building? A. Erect the concrete bucket for hoisting concrete.

Q. From the sub-cellar? A. Sub-cellar up to the height of the building.

Q. A concrete bucket? A. Bucket, yes.

By Mr. McCarthy.

84 Q. For raising that bucket, what did you use there? A. The power?

Q. Now, I mean how did you raise it—on what forms? A. On rails, guide rails.

Q. Those are guide rails? A. Yes.

Q. And how far are they spaced or were they spaced, Mr. Moran? A. Between rails?

Q. That is right, sir. A. 55 inches.

Q. That is a little over 4 feet, is that right, sir? A. Yes.

By the Court.

Q. What do you mean between rails? That is the width of the shaft through which this went was 55 inches? A. From this point to this point.

Q. The width between the two tracks was 55 inches? A. 55 inches, approximately.

By Mr. McCarthy.

Q. What was the other dimension of the shaftway to accommodate the bucket? A. The shaft is, as I remember, it was probably about 10 foot long in the span, what we call the bay. 86

By the Court.

Q. What do you mean by that? A. The width of the span.

Q. Then it would be 10 feet by 55 inches? A. Yes. Well, no——

Mr. McCarthy: Talk louder.

A. That bay was probably about 10 by 12 feet, as I remember it.

By Mr. McCarthy.

Q. The whole bay? A. Yes. 87

By the Court.

Q. What do you mean by a bay? A. Just the width of the beams where they are made fast on the panels.

Q. Put it this way, the space, the entire space was ten by what? A. Twelve about.

Q. Ten by twelve? A. Yes, sir.

88 *Anthony F. Moran—For Plaintiff—Direct.*

Q. How large was the bucket that was to— A. 55 inches, the bucket.

Q. Fifty-five by what? A. Fifty-five by fifty-five, square.

Q. So that went up into that larger space? A. Yes, sir.

By Mr. McCarthy.

Q. On the day in question, where was the bucket that you have been referring to? A. In the basement.

Q. Was it in position at that time? A. In posi-
89 tion.

The Court: What basement is he referring to, the lowest part?

Mr. McCarthy: That is the lowest part, the sub-basement.

The Court: You say——

Mr. McCarthy: We were all mixed up in this examination before trial.

The Court: We don't want to be mixed up here. That is the reason why I break in once in a while.

By Mr. McCarthy.

Q. That was in the sub-basement, Mr. Moran, is
90 that right? A. Yes, sir.

Q. Where was it, if you know, at the time that you left there on October 24th, in the sub-basement? A. It was in the sub-basement.

Q. In relation of the guide rails which were being erected, where was it? A. They were up about to the second, the third tier, second tier, one story above the basement floor.

By the Court.

Q. Who was there, what was there? A. The rails, the guide rails, the rails that was going to guide this bucket, Judge, your Honor.

Q. Those were the rails that you were installing? A. Yes, sir.

Q. They were up to the third floor? A. Up to the second floor.

Q. What does that mean, that is two stories above the sub-basement? A. One story above the sub-basement. We call the sub-basement the first floor as we would call it; then the second tier would be the second floor. The same as this would be 92
the basement floor here and that would be the second floor on our way of figuring.

Q. Let's see if we can't get it a little bit better. There was a street level, wasn't there? A. Yes, sir.

Q. Then there was one floor below that, is that right? A. That was the bottom.

Q. What do you call that? A. The basement.

Q. What do you call the floor level of the street? A. Sub-basement floor.

Q. As you go up it becomes "sub"?

Mr. Mellen: The difficulty, your Honor, is this, I don't think there is any question about it; photographs will show there was really no street level. There was the sub-basement, then the basement, and the street 93
level actually came about midway between the basement level and the first floor.

The Court: Your gentlemen work it out. You are very skilled.

Mr. McCarthy: We will have to wait until we get some pictures in here anyway.

The Court: All right.

94 *Anthony F. Moran—For Plaintiff—Direct.*

By Mr. McCarthy.

Q. Were you familiar with the condition of the first floor above the sub-basement on the day that the accident happened to Sadrakula? A. Yes.

Q. At the time that you left it? A. Yes.

Q. In the morning? A. Yes.

Q. Can you describe the condition of that area around the guide rail shaftway on the day in question that you left? A. It was practically an open area.

Q. Were there any planks there at all? A. Yes, a few.

95 Q. I show you a picture and I ask you if that picture, particularly referring to the areas surrounding the guide rails and on both sides, foreground and background, accurately and fairly reproduces the condition of the first floor on the Federal office building on the day that Sadrakula died, as you last saw it at 9 o'clock in the morning? A. Yes, sir.

Mr. McCarthy: I offer it in evidence.

Mr. Mellen: You said that this represents the condition.

By the Court.

96 Q. When he left on that day; that was about 9 o'clock on October 24th? A. Yes, sir.

The Court: Mark it.

(Received in evidence as Plaintiff's Exhibit 1.)

The Court: Hand it to the jury.

(Exhibit 1 was handed to the jury.)

By Mr. McCarthy.

Q. Does that position show in detail the exact position of the planks or does it show it generally? A. General.

Q. There might have been a change here and there? A. Yes.

Q. I show you a picture and I ask you if that is a fair and accurate representation of the sub-basement floor particularly referring to the position of the bucket and the open bays on the first floor above on the day in question when you left at 9 o'clock in the morning? A. Yes, sir.

98 Mr. McCarthy: I offer that in evidence.

(Handed to Mr. Mellen.)

The Court: This is one story above?

Mr. McCarthy: No, this is one story below.

The Court: You are using "sub" in a different way than he does. That is where the confusion arises. Have them put it basement and one story above. This is the basement, is it?

The Witness: Yes, the basement, your Honor.

The Court: Any objections, Mr. Mellen?

Mr. Mellen: No, as long as it is understood; of course the stipulation uses the term 99 sub-basement and I don't want any question that there is a change or departure from the stipulation.

The Court: Of course, but so that there will be no confusion, let's call what really is the cellar the basement and the floor above one floor above. Won't that be better?

Mr. Mellen: That is all right.

The Court: Because they use sub-basement when it isn't at all.

By the Court.

Q. This—? A. This is the bucket.

Q. This is the lowest part of the building? A. Yes.

The Court: Mark that.

(Received in evidence as Plaintiff's Exhibit 2.)

Mr. McCarthy: At this time, your Honor, I offer in evidence the original contract between James Stewart, called the contractor, and the United Hoisting Company, called the sub-contractor on August 15, 1935, executed by what appears to be the proper parties.

Mr. Mellen: There is no dispute about that.

(Received in evidence as Plaintiff's Exhibit 3.)

Mr. McCarthy: Shall I read this contract?

The Court: What is the good of it?

Mr. McCarthy: This is between the United and Stewart.

The Court: Whereby the United is to erect this bucket?

Mr. McCarthy: That is right and make certain installation charges. There is a large hopper or bin as they call it.

Mr. Mellen: And other equipment.

The Court: You don't need that. If the jury want to see it later, they may.

Mr. McCarthy: All right, sir. That is all.

Cross-examination by Mr. Mellen.

Q. Referring to this photograph, Plaintiff's Exhibit 1, you said, I believe, that this shows the condition as you observed it on the morning of October 24th, 1935? A. Yes, sir.

Q. Everything in exactly the same position as it is here? A. There might have been a few planks moved from there or there might have been some 104
added.

Q. Well, don't you know as a matter of fact, Mr. Moran, that this photograph was not taken until about two months after this accident? A. No, I don't know that.

Q. Do you attempt to say that you can remember in detail the position of planks, ladders, ropes, things of that kind on the morning before this accident when you left the job? A. That was the condition when I was there.

Q. Well, let's call your attention to this first piece of wood that seems to be a spliced piece, in the foreground of the picture. A. This one here?

Q. Yes. You say that that piece of wood was 105
there in exactly that position when you left the job that morning? A. That was a rail.

Q. Do you say that that was there in that position when you left the job that morning? A. As I remember it.

Q. As you remember it? A. Yes, sir.

Q. Did conditions remain the same around that opening on that job for even thirty days after the accident? A. I wouldn't say that.

Q. They didn't, isn't that true? A. Thirty days? Impossible.

Q. A month, yes. Didn't conditions change on that job every day? A. Yes, sir.

Q. Work continued on after this accident, didn't it? Did it continue on after this accident? A. That is the condition it looked to me the morning I was there.

Q. Now, Mr. Moran, will you please answer my
107 question: The work continued after this accident, didn't it? A. Yes, sir.

Q. Your men went on and completed the installation of this various equipment? A. Yes, sir.

Q. And how long did you continue to work at the job? A. We were there every day for about a week during the installation.

Q. That is a week after this accident? A. A week after the accident, approximately.

Q. Did you see these pictures, either one of them, Plaintiff's Exhibits 1 or 2 taken? A. Only to-day.

Q. The first time you ever saw them? A. Yes, sir.

Q. So that since 1935 you haven't seen the photographs that you have seen this morning? A. No.

108 Q. And you say that you can recall that these photographs, that you never saw before, show the condition precisely as it was on the morning before this accident occurred? . . . .

The Court: On the morning of the accident.

Mr. Mellen: The morning of the accident, but prior to its occurrence.

A. That is the way it looked to me the morning of the accident.

Q. All right. You have spoken of a bay, Mr. Moran, isn't it in the building trade, by a bay they mean the steel enclosed within practically a square where there is a column at each corner? A. It shows right here, that is a bay.

Q. Would you please listen to me.

The Court: Just answer what you are asked.

Q. This photograph, Plaintiff's Exhibit 2, I call your attention here to an upright at the extreme 110
right of the photograph. A. Yes, sir.

Q. And another one in the middle of the photograph. A. Yes, sir.

Q. In back of it. Those are columns, are they not? A. Columns, yes.

Q. There would be another column which does not show, which would be approximately at the left-hand corner of the photograph here? A. Yes, sir.

Q. And another one here at the right? A. Yes.

Q. Isn't the space between those four columns a bay? A. That is what is a bay, yes.

Q. You had here in that bay it was subdivided at the floor above the bottom floor? A. Yes, sir. 111

Q. And so that you had two girders running through there that divided that bay into three panels? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. The bay itself was approximately 30 feet long by something like 20 feet wide, wasn't it? A. About that, yes.

Q. And each panel was also 30 feet long? A. Yes, sir.

112 *Anthony F. Moran—For Plaintiff—Cross.*

The Court: What is a panel?

Mr. Mellen: The subdivision of a bay.

Q. Is that correct? A. Yes, sir.

Mr. Mellen: In other words, you have three divisions of a bay and each is a panel.

Q. Is that correct? A. Yes.

Q. These in this building, the 30-foot dimension of the bay was east and west, wasn't it? A. Yes, I guess it was.

Q. One end toward West Broadway and the other end towards Church? A. Yes.

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Q. And the divisions into panels was in the same way? A. Yes.

Q. So that each panel ran east and west? A. Yes.

Q. So that you then had a panel which was approximately 6 to 7 feet— A. Yes, sir.

Q. Wide and 30 feet long? A. Yes.

Q. Before you and your men came on the job, the location of this hoist and of the other equipment had been determined, hadn't it? A. Yes, sir.

Q. That is, your bosses go on the job first, don't they? A. Yes, sir.

Q. And in this particular case—do you know Mr. Edlund or Mr. Wisnar or Mr. White— A. Yes.

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Q. They were all the executives of the Hoist Company, were they not? A. Yes, sir.

Q. In this case you followed the usual practice, they went on the job and the location in the job of the equipment was determined before you went there? A. Yes, sir.

Q. And you got your instructions when you went there as to the place that had been agreed upon? A. Yes, sir.

Q. In this case the place that had been agreed upon was in this particular bay? A. Yes, sir.

Q. And in the center panel, the middle panel? A. Yes, sir.

Q. To install this hoist and the rails on which the hoist would run, the opening had to be left for the steel, didn't it? A. Yes, sir.

Q. And if it were floored in or covered over, you couldn't install it? A. No, sir.

Q. And you said, I believe, that your men had worked there just a day before the accident? A. Yes, sir.

Q. Well, the accident was on the 24th of October, wasn't it? A. Yes, sir.

Q. Do you recall that you started putting in the guide rails on October 18th? A. That might be possible.

Q. Assuming that that was a Friday—and then you continued. Do you remember that Tuesday of the following week there was rain in the morning, does that refresh your memory as to the circumstance there? A. I don't remember that.

Q. Do you remember whether or not you worked in the afternoon of that day? A. I couldn't remember.

Q. You haven't any record that you have used to refresh your recollection as to just the dates of this work and so on, have you? A. No.

Q. So that when you said that you—I mean you and your men—worked just one day, you are relying on your recollection of three years ago? A. Yes, sir.

Mr. McCarthy: Two years ago.

Mr. Mellen: Two years ago, I should say.

118 *Anthony F. Moran—For Plaintiff—Cross.*

Q. Well, now, when you came to install this hoist; the panel in which it was to be installed was, of course, considerably longer— A. Yes, sir.

Q. Than the space that you needed for the hoist itself? A. Bucket, yes.

Q. And the first thing you had to do was locate exactly in what part of that panel you were going to put the hoist? A. Yes, sir.

Q. In other words, if we assume that the top of this table is the panel, the hoist was going to run up and down some place in this panel? A. Yes, sir.

119 Q. But, of course, you couldn't put the guide rails at the ends, fasten them on that steel? A. No, sir.

Q. Because that would be too far apart, isn't that right? A. Yes, sir.

Q. So that the way you do or the men under your supervision is you put some pieces of wood across the panel at spaces that will hold the rails just the right distance apart for the bucket, isn't that correct?

Mr. McCarthy: I object to this, if your Honor please, on the ground that it is not definite or binding and hasn't any reference to this particular job and does not show any duty.

120 The Court: I will allow it.

Mr. McCarthy: Exception.

Q. Isn't that true?

The Court: Read that, Mr. Reporter.

(The question was read by the reporter.)

The Court: I don't understand that.

Mr. Mellen: I will withdraw the question and try to frame it a little more intelligently.

The Court: I don't say it is unintelligent but you are so surfeited with it that you think we are.

Q. I call your attention to Plaintiff's Exhibit 2 and resting on the steel of the floor above the bottom floor to which the rail, guide rail, is attached is a piece of wood or more than one? A. Yes, sir.

Q. And that is what they call the bucking piece, isn't it? A. Yes, sir. 122

Q. And then there is another one to which the other rail is attached? A. Yes, sir.

Q. And those bucking pieces, as you call them—

By the Court.

Q. Where are they? A. Right here (indicating on Exhibit 2).

The Court: After we get through, we will know how to build a post office.

Mr. Mellen: That is one bucking piece and this is the other. No. 22. Wood. Did you all see where I pointed to?

(The jurors nodded assent.)

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By Mr. Mellen.

Q. In other words, again taking the top of the table as the panel, one of those bucking pieces would be put about at any distance that you happened to choose from one end of the panel? A. Yes, sir.

Q. And then the distance that the other bucking piece would be from that would depend on the width of the bucket? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

By the Court.

Q. In this case it was 55 inches? A. About 55 inches.

By Mr. Mellon.

Q. Part of the erection job done by your men is the placing of those bucking pieces in the panel at
125 each floor level, isn't it? A. Yes, sir.

Q. And those bucking pieces are—what size are they, what kind of planks are they? A. Two by nine, about two by nine or nine by twelve.

Q. Of course these girders or beams are big I-beams, are they not? A. Yes, sir.

Q. In other words, in the shape of a capital I? A. Yes, sir.

Q. And there is a bottom flange, a projection? A. Yes, sir.

Q. And the bucking piece rests on the bottom flange? A. Yes, sir.

Q. Now, then, above that bucking piece you have what is shown here like a little piece of wood ex-
126 tending down from the top flange to the bucking piece inside that I-beam, a wedge, looks like a wedge? A. That is a rail.

Q. This right here, a little piece— A. That is a brace.

Q. That is to hold that bucking piece rigid on that bottom flange, isn't it? A. Yes, sir.

Q. And that also is a part of the installation of the equipment by the hoist men? A. Yes, sir.

Q. All of this work of installation of these guide rails, not only on this job, but all jobs when you start installing it, you have to have the open steel—A. Yes.

Q. There to put it in? A. Yes, sir.

Q. And your men usually go in on a job either before or at about the same time that the carpenters start the centering? A. Yes.

Q. And the floor slabs are not poured until after you get your equipment installed, are they? A. Not at all times. They had poured floor slabs on that building before we got installed.

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Q. What is I mean is this: The purpose of this bucket hoist is to carry the concrete from the ground or from wherever the mixer is up to the various floors where it is to be used for pouring into the centers? A. Yes, sir.

Q. In this building on the basement floor on this floor above the bottom floor, on the morning of the accident, while you were there, the centers were over a considerable part of that building, were they not? A. Yes, sir.

Q. That is the forms. And there was some concrete poured in some parts? A. Yes, sir.

Q. That was what they call "ready mixed," wasn't it? A. Ready mixed, right.

Q. In other words— A. Brought in by a truck.

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Q. It is a special kind of concrete that they can get that is already mixed and use it prior to the installation of the regular concrete equipment? A. Yes, sir.

Q. The guide rails by the morning of the accident had been put in for several floors? A. Up to the second.

Q. Well, that would be, if we call it the basement— A. Two floors.

Q. The floor above the bottom and one floor above that and another floor above that, so that it was up for three floors above the bottom? A. Yes.

Q. That means, of course, that the bucking pieces were in. A. Yes, sir.

Q. And had that work been done by Sadrakula and the men working under him? A. Yes, sir.

Q. And above the floor next—on the floors above the one that shows in the photograph, Plaintiff's Exhibit 1, the floors above that— A. Yes.

Q. The panel and bay were open, were they not? A. Yes, but the guides weren't fast.

Q. Were they open? A. Yes, the bay was open.

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Q. On those floors at least two floors above this floor shown on Plaintiff's Exhibit 1, there were bucking pieces in place? A. I don't believe they had been placed up to that time on that floor.

Q. You told us that the guide rails were up. A. Yes, but they could be stuck up there without being bucked in.

Q. Please listen. Were they up? A. They were up.

Q. Were they fastened to anything? A. That I don't know up to that height. They weren't when I left.

Q. When you left that morning? A. They weren't bucked up to the second floor. They were on the

132 first.

Q. Just a minute. On the floor, on the second floor above the bottom, when you were there that morning, were the guide rails fastened to anything at that level, the second floor above the bottom? A. They were up to that floor. Whether they were fastened or not, I don't know.

Q. These guide rails are wood, are they not? A. Yes, bolted together.

Q. And they are bolted together, they are in rather long lengths, aren't they? A. 12 or 13 foot long.

Q. When you bolt them together you have about how many sections bolted in one? A. Two sections.

Q. So that you will have a piece about 26 feet long? A. Yes.

Q. There is no question that from the bottom floor to the floor above it, the guide rails on both sides were in position? A. Yes, sir.

Q. And at that level they were fastened to the bucking pieces? A. Yes, sir.

Q. Now, above that you saw that the guide rails 134
extended on up through the opening above that? A. Yes, sir.

Q. Were they just hanging swaying up there? A. The both rails were stuck up there, but to my mind when I left there that morning they hadn't been bucked in.

By the Court.

Q. You mean fastened? A. Fastened? They might have been, but I didn't see them fastened.

Q. They were fastened up to the first floor above the basement, but not above that? A. Not as I remember it.

By Mr. Mellen. 135

Q. When you looked up there, were there bucking pieces in place on that floor next above this one shown in Plaintiff's Exhibit 1? A. I don't remember that.

Q. What was the first thing that your riggers did when they came on that job? A. The first

thing they done was to measure up the well hole where the bucket was to go. Then plaged their rails.

Q. Would they put the bucking pieces in position before they put up the rail? A. Temporary, yes, the first rail.

Q. Isn't it a fact that the way that would be done would be to put up the rail on one side first? A. Yes, sir.

Q. They put the bucket in position down on the ground? A. On one side.

Q. So that the bucket would engage in the rail on that side? A. Right.

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Q. Then take the rail on the other side and measure it in and fit it in position in contact with the attachment on the bucket? A. Right.

Q. So that you get the exact distance instead of measuring it with a ruler? A. Right.

Q. Then as you go up with your work you keep it in line with the plumb? A. Yes.

Q. And the location of these rails was a very important part of the job, wasn't it? A. Yes, sir.

Q. They had to be absolutely straight? A. Yes, sir.

Q. Or the bucket wouldn't ride up and down on it? A. Yes, sir.

Q. This bucket was to be electrically operated, wasn't it? A. Yes, sir.

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Q. And it would travel at a very high rate of speed up and down there? A. Yes, sir.

Q. When in operation? A. Yes.

Q. So that the position of those guide rails was very important, wasn't it? A. Yes.

Q. And Sadrakula himself had the job of seeing to it that they were in accurate position, and accurate alignment? A. Yes.

Q. And he had to keep plumbing as the job went on, getting that plumb line along the rail to see that it was absolutely straight? A. Yes, sir.

Q. And in absolutely correct position with relation to the bucket, isn't that true? A. Yes.

Q. That meant careful measuring of the position of the bucking piece in the panel so that it would hold that rail in the proper position? A. Yes, sir.

Q. And wedging it in properly, isn't that true? A. Right.

Q. So that in doing that, Sadrakula, you saw him time after time, didn't you, working around this opening; as he is putting in the guide rails, he would lean over the edge, hold his plumb line down, measure the distances along the rail and its position in the opening, isn't that true? A. They measure the distance with a distance rod between the rail. 140

Q. He would have to drop a plumb line at times down in the opening? A. No, they measure them this way, rail here, rail there, in between.

Q. Please listen to me. Didn't he have to at times drop a plumb line right alongside of the rail? A. No, they never used the plumb line. They used their eye.

Q. What? A. They plumbed with their eye.

Q. What? 141

The Court: With their eye.

Q. They used something to see that those rails were absolutely straight up and down? A. Yes.

Q. That was Sadrakula's job, wasn't it? A. Yes.

By the Court.

Q. How long before the day of the accident had the guide rails been fastened up to the first floor, that is one floor above the lowest floor, if you know? A. I think, Judge, your Honor, there was one or two rails put in the day before.

Q. And fastened? A. No, they weren't fastened. They were only temporary.

Q. We are talking about the rails from the basement—the lowest part to the floor above. A. They were laid down from the floor above to the basement.

143 Q. But not fastened? A. Not fastened as I remember it.

By Mr. Mellen.

Q. In the work of installing the rails and the bucking pieces and so on in the panel, your men used planks, didn't they? A. Sometimes they did, sometimes timbers.

Q. Well, at any rate, they would take something and put them across the steel beams, isn't that true? A. Sometimes.

Q. Well, here that is what they did, didn't they? A. That I don't remember what they done there. There was some plank on that floor.

141 Q. You saw them taking planks, didn't you, and putting them there in position so that they could stand on them to do their work on the bucking pieces and the rails, didn't you see them doing that? A. That particular morning there was no plank around.

Q. Please, will you answer my question, Mr. Moran

(The question was read by the reporter.)

A. Yes, if you figure it that way.

Q. You returned about 4 o'clock that afternoon, did you? A. 4 o'clock.

Q. And you learned that an accident had happened? A. Yes, sir.

Q. And I suppose you went to where it occurred and looked around? A. Yes. I went right to the hospital from there.

Q. You questioned your men, didn't you? A. No, I went right to the hospital when I got to the job.

Q. Tell me: I call your attention again to Plaintiff's Exhibit 1. I notice a large contrivance of some sort with a couple of men standing in the shadows of it to the left of the photograph, what 146
is that? A. That is a bin, concrete bin.

Q. Material bin? A. Yes, that is for gravel and sand and cement.

Q. Was that in the position that it appears on the photograph at the morning of the accident? A. Yes, I believe it was.

Q. Was that something that your company also installed? A. Yes, sir.

Q. That was equipment that came under the contract of the United Hoist that you were furnishing for Stewart? A. Yes, sir.

Q. Was that part of the job of Sadrakula and the other riggers in installing that? A. Yes.

Q. That big bin there rested on the steel work, didn't it? A. Yes. 147

Q. And it took up all of the bay alongside of it, the bay adjoining the one where the hoist was? A. Yes.

Q. In the equipment that you were putting in—withdrawn for the moment. This building as it shows here in Plaintiff's Exhibit 2, only a section of the building went up at that particular time? A. Yes, that is right.

Q. In other words, excavation was going forward and then they started with the superstructure or the steel work at the westerly end? A. Yes, sir.

Q. In just one section, and this particular bay where the hoist was installed was in the extreme easterly bay? A. Yes, sir.

Q. So that you had no building beyond that particular bay? A. That is right.

Q. This photograph, Plaintiff's Exhibit 2, is taken looking east, isn't it? A. Yes, sir.

Q. And the bay immediately at the left in this photograph, this bay right along here at the left in
149 Plaintiff's Exhibit 2, which is the bottom floor—that is a different floor— A. Yes.

Q. —that is the bay upon which this bin rested on the floor above? A. Yes.

Q. On the bays to the south of the one where the hoist was—do you know what I mean? A. Yes.

Q. That would be on the right of the photographs as you have them there. A. You mean this here (indicating)?

Q. Yes, the next bay to the right. There was no steel work at all, was there, on that level, the floor above the bottom? A. No, there was a girder there.

Q. Isn't it a girder that runs east and west? A. Yes.

Q. Weren't the north and south girders open en
150 tirely? A. Yes.

Q. In other words, that was a driveway, wasn't it? A. Beyond this girder here was a driveway.

Q. To the right of those photographs? A. That was a ramp.

Q. Immediately alongside of it was a driveway? A. Yes.

Q. And that was left open entirely so that there would be head room for trucks coming back and forth through that drive?. A. Yes.

Q. So that at the basement level in this Plaintiff's Exhibit 1, which shows the floor above the bottom, there is no steel at all to the right of the photograph? A. Right.

Q. Plaintiff's Exhibit 1 is entirely open, there was no floor at all, it was the edge of the building? A. Right, the edge of the ramp.

Q. Now, the equipment that you were installing withdrawn. Did you have anything to do with the bricklayer's hoist? A. Yes. 152

Q. That was under a different contract. A. Different contract.

Q. With somebody else. Originally, wasn't it intended to place the bricklayer's hoist in this same bay but back in the corner at the right foreground of this picture, Plaintiff's Exhibit 1, wasn't that your original plan?

Mr. McCarthy: I object to this since it does not place the time, it does not have any relevancy to the issue involved here.

Mr. Mellen: At the time he first started to work here around October 18, 1935.

Q. When you first started the installation work— 153

Mr. McCarthy: I still say that has nothing to do with the condition that existed on the day of the accident.

The Court: The intention wouldn't control, would it, Mr. Mellen? It is what actually——

Mr. Mellen: What I want to show is this: That it was at about the time of this accident that the location of that bricklayer's hoist, the decision was made to change the location of that bricklayer's hoist, that at about this time it was still intended to put it at that position.

Mr. McCarthy: I object to that. That certainly is no excuse under the law for any failure to plank over in that particular place.

The Court: I will allow it.

155 Mr. McCarthy: Exception.

Q. The United Hoist had a contract with some other contractor on the job for the installation of a bricklayer's hoist, didn't it? A. Yes.

Q. And it was originally intended, planned and agreed to put that hoist in this same bay that the concrete hoist was placed, was it not?

Mr. McCarthy: I object to that.

The Court: I will allow it.

Mr. McCarthy: Exception.

By the Court.

Q. Was that the original intention? A. Not that
156 I know of. I don't think so.

The Court: He doesn't think so.

Mr. Mellen: That is all.

Redirect examination by Mr. McCarthy.

Q. Referring to that panel that is demonstrated in Plaintiff's Exhibit 1, here to the south of the panel where the guide rails were erected, you see that one there? A. Yes.

Q. Between this beam here and the farthest beam? A. Yes.

Q. Was it necessary to leave that open in order to erect the guide rails? A. No.

Mr Mellen: I object to that as calling for a conclusion.

Mr. McCarthy: Your Honor, I think Mr. Mellen opened the door by asking this question that it was necessary to leave it open, and the question now becomes how much was necessary to be left open in order to protect these workmen.

Mr. Mellen: Oh, no. 158

The Court: Don't you see, that he is deciding what the jury will have to decide.

Mr. McCarthy: No, but your Honor please, this question was presented to the witness——

The Court: I will exclude it.

Mr. McCarthy: I take an exception.

Q. Was it necessary to leave the entire panel surrounding the guide rails open? A. No.

Q. In order to erect these two guide rails? A. No.

Mr. Mellen: That is objected to.

The Court: Sustained. 159

Mr. McCarthy: Exception.

Q. Was it necessary to leave the panel to the north— A. No.

Q. Just a moment, please—to the north of the panel in which the guide rails were erected in order to install any of your equipment?

Mr. Mellen: That is objected to.

The Court: The form of your question is wrong because isn't that going to be the ultimate question for decision?

Mr. McCarthy: In a way it probably will reflect on it.

The Court: Don't you see, you are not asking opinion. You are having him state as a fact. Now he can give his opinion.

Mr. McCarthy: I will reframe the question, Judge. I can reframe it.

The Court: Yes, it is bad in form. I don't
61 suppose there is any question about his expert opinion?

Mr. Mellen: I think there may be a very serious question as to expert opinion.

The Court: Ask how many of these he has built and so on.

Mr. Mellen: We are dealing with placing centering. I don't think that this man knows anything at all about the centering or concreting——

Mr. McCarthy: I object to what Mr. Mellen thinks. He can't attack the testimony of this gentleman here.

The Court: I am going to allow Mr. McCarthy to try to qualify him.

62 Mr. Mellen: I thought your Honor was assuming qualifications?

The Court: No. I said he hadn't been qualified.

Q. How long have you been employed in this capacity as superintendent? A. Thirty-five years.

Q. During the course of your thirty-five years, have you been engaged in the erection of guide rails in different buildings? A. Yes, sir.

Q. What buildings have you erected guide rails on? A. All the big things in New York.

Q. Well, give us an example.

By the Court.

Q. How many? A. Radio City, Knickerbocker Village, Empire State.

By Mr. McCarthy.

Q. During that period of time of thirty-five years 164
you have had occasion to observe the custom and the operation and the installation of guide rails by your men? A. Yes, sir.

By the Court.

Q. And installation of planking? A. Yes, sir.

Q. Over the rails or beams? A. Over the beams.

Q. Over the steel beams? A. Yes, sir.

By Mr. McCarthy.

Q. Was it the usual custom to leave the entire bays open— A. No.

Q. At the time of the installation of the guide rails? 165

Mr. Mellen: That is objected to, if your Honor please. In the first place the question, qualification was his observation of the custom of his men.

The Court: Oh, no.

Mr. Mellen: That was the question asked.

The Court: Read the question.

166 *Anthony F. Moran—For Plaintiff—Redirect.*

(The question was read by the reporter as follows: "Question: During that period of time of thirty-five years you have had occasion to observe the custom and the operation and the installation of guide rails by your men?")

By the Court.

Q. Have you observed the custom throughout the Manhattan area or the area in the City of New York— A. Yes, sir.

Q. As to how these planks were placed? A. Yes.

167 Mr. Mellen: That is objected to.

The Court: I will allow it. Just yes or no, whether he has observed it.

By Mr. McCarthy.

Q. How many other companies are there that erect these guide rails in the City of New York? A. Three.

Q. Three others or three including your own? A. Two others including our own.

Q. Two including our own? A. Three including our own.

Q. Can you tell us from watching——

168 *By the Court.*

Q. Have you observed the way that the other companies have done their work? A. No, I have not. I never bothered.

Q. Then you don't know what the custom is, do you? A. The custom is the same all around.

Q. If you have not observed it, you don't know what the custom is, do you? A. I wouldn't say that.

The Court: All right.

By Mr. McCarthy.

Q. In the installation of the guide rails, did you use this panel in any way for any installation, that is to the south, the one on the, as you look at it, would be the right of the ~~panel in~~ which the guide rails were erected? A. You mean the panel behind the guide rail?

Q. To the right. A. No. 170

Q. Didn't use that for the installation of any guide rail, did you? A. No.

Q. Or for the installation of the bucket? A. No.

Q. Did you use the part of the area in the panel to the west or to the east of the particular panel where the guide rails were erected for the installation of the guide rail or any other part of your equipment? A. Not east of that.

Q. Did you use any part of the panel to the west of where the bucking piece and guide rail was for the installation of your equipment or your guide rail? A. Only to roll that bin over. That is all.

Q. You do that how? A. On three by nine timbers. 171

Q. Those you put down? A. Yes.

Mr. McCarthy: That is all.

Recross-examination by Mr. Mellen.

Q. Taking the panel, middle panel, where the guide rails were installed, until they were installed by your men, nobody could tell in just what part of that panel they were going to be——

Mr. McCarthy: I object to that, if your Honor please.

The Court: Sustained. Already asked and answered long ago, under your cross-examination.

173 Q. Your work during all of these thirty-five years has been entirely in the installation of equipment in buildings, hasn't it? A. Mostly, yes.

Q. Have you ever worked at the construction of reinforced concrete floor slabs? A. No, sir.

Q. Or of the construction of centers for reinforced concrete floor slabs? A. No, sir.

Q. Don't know anything about it, do you? A. Any more than the way they are laid.

Q. You have seen it, that is all? A. I have seen it, yes.

Q. But to know anything about it, you don't, do you? You have never worked at it? A. No.

By Mr. McCarthy.

174 Q. On the day in question you stated before that the steel work above this was all open? A. All open.

Q. And particularly the area above the guide rails there? A. Right.

Q. There was nobody working up there that you know of? A. No.

By Mr. Mellen.

Q. Do you know as a matter of fact that prior to this day both Sadrakula and his men had worked on the floors above this floor that is shown in Plaintiff's Exhibit 1? A. No, I wouldn't say I did.

Q. You know, don't you? Didn't you see them up there? A. The day before the accident?

Q. I didn't say the day before, but some time before the day of the accident. A. On that particular job?

Q. On that job. A. The only thing they had to do above that was to plumb down.

176

By the Court.

Q. Did you see them working above? A. No, I did not. I know they do it, though.

By Mr. Mellen.

Q. From the position of the rails and what had been done on the morning of the accident, the day of the accident, had there been in the routine of the work some plumbing down? A. Yes.

Q. And that would mean from floors above this floor? A. Floor above that, yes.

Q. And that would be Sadrakula's job? A. Yes.

Q. And he had been up there? A. Yes.

177

Mr. Mellen: That is all.

Mr. McCarthy: That is all.

178 *Frank A. Benson—For Plaintiff—Direct.*

FRANK ARTHUR BENSON, 2241 Creston Avenue, Borough of the Bronx, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. McCarthy.

Q. Mr. Benson, by whom are you employed? A. By United Hoisting.

Q. In what capacity were you employed? A. Rigger.

Q. Were you so employed on the 24th day of October, 1935? A. Yes, sir.

179 Q. And were you employed on what is known as the Federal Office Building job? A. Yes, sir.

Q. And were you one of the men that was working in the gang under Sadrakula? A. Yes, sir, I was.

Q. Do you remember the day of the accident to Sadrakula? A. Yes, I remember it well.

Q. How long before the day of the accident had you been working on that job? A. Well, I come there in the evening the day previous to the accident.

Q. Are you sure about that? A. Yes, about 4 o'clock, I think.

Q. Were you familiar with the condition of the bay in which the guide rails on the west side of 180 that building on the first floor had been erected? A. Yes, I was.

Q. Were you familiar with it at the time that you went there the day before the accident? A. Yes.

Q. Will you describe the condition of the bay and all the panels in there, particularly in refer-

ence to planking over the steel beams on the first floor above the basement floor on the day before the accident?

Mr. Mellen: I object to this, "the day before the accident."

The Court: I will allow it. Then they can show that the same—of course the issue will be what was the condition on the day of the accident, but they lead up, of course.

Mr. Mellen: All right.

The Court: Read the question.

(The last question was read by the reporter.) 182

Q. On the day before the accident, when you first went down there— A. The bucket was placed almost in the center of that bay.

Q. That is in the basement floor? A. Yes.

Q. Now I am speaking about the floor above that, Mr. Benson.

By the Court.

Q. What was the condition of the planking on the floor above where the bucket was the day before the accident? A. Next to one of the guides was a plank, an 8-inch plank. I remember that well. Then came——

Q. An 8-inch plank? A. Yes, an 8-inch plank. 183
Then there was a ladder and two rails, I believe. And there was a beam. I think there was a beam laying closer to the girder, next to the forms.

Q. Laying next to what? A. Next to the forms.

Q. What do you mean by "forms"? A. That is the forms where they pour the concrete on.

The Court: All right.

By Mr. McCarthy.

Q. Were you familiar with the condition of the first floor above the basement of the particular place referred to before just about the time the accident happened to Sadrakula? Were you familiar with the condition of the planking at this particular bay at the time the accident happened to Sadrakula? A. Yes.

Q. And was it different or was it the same as the condition which had existed the night before? A. Well, that was the same. It was not changed because I remember that well.

185 Mr. Mellen: I object to anything that is volunteered.

The Court: Well, that is not important.

By the Court.

Q. Where was that 8-inch plank? A. Laying next to the guide, facing west.

Q. One 8-inch plank? A. Yes.

Q. There were no other planks other than the 8-inch plank over that bay? A. No, not until—I think there was a 9-inch beam laying next to that girder but——

Q. What do you mean by a 9-inch beam? We don't know. A. Nine by three-inch beam.

186 Q. Is that a metal beam—steel beam? A. No, wooden beam.

Q. There was a 9-inch beam next to it. Where was the 9-inch beam? A. That was laying close to the girder that was north and south where the bucket was placed in that bay.

By Mr. McCarthy.

Q. Now I show you the picture which has been introduced in evidence as Plaintiff's Exhibit 1 and ask you if that is a fair and accurate reproduction of the condition that existed on that particular floor in the particular bay adjacent to the place where the guide rails were being erected, particularly with reference to the planking on the day of the accident to Sadrakula? A. That is a perfect picture.

Q. I call your attention to the beam or the plank which is shown there right adjacent to the guide rail. Is that the one that you are referring to? 188
A. That is the one (Plaintiff's Exhibit 1).

By the Court:

Q. Point that out. A. That is the one.

Q. Which, this here? A. Yes, sir.

The Court: Suppose I mark that "1."

Mr. McCarthy: If you please.

The Court: I just put a "1" alongside of the rail on the plank.

By Mr. McCarthy.

Q. Mr. Benson, you saw this picture before in my office, didn't you? A. Yes.

Q. You have seen that before? A. Yes. 189

Mr. McCarthy: For the purpose of keeping you familiar with the development here, it is this plank that runs north and south to what is the west. This would be the Hudson River side of this building. That would be the east. That is the Church Street side.

The witness has just referred to this plank that his Honor marked with a "1" as being the plank adjacent to the west side or the west of the guide rails.

By Mr. McCarthy.

Q. You worked there all day on the day of the accident to Sadrakula? A. Yes, sir.

Q. Did something happen some time in the day to Sadrakula—an accident happen to him? A. Yes, sir.

Q. About what time of the day, if you know?
191 A. Well, that is about—I cannot tell the exact time but I judge about 3.30 or something like that.

By the Court.

Q. In the afternoon? A. In the afternoon.

By Mr. McCarthy.

Q. Before this accident to Sadrakula, did you happen to have a conversation with or be in the company of Sadrakula, the dead man? A. Yes, sir.

Q. How long before the accident, if you remember, did that occur?

Mr. Mellen: I object to that. I don't know how he can know how long before the
192 accident it was unless he saw the accident.

Q. Before your attention was called to something happening to Sadrakula?

The Court: I will allow it.

A. About one minute.

Q. Where were you before this time expired with Sadrakula? A. Well, at the time Mr. Murray, Mike Secola and myself were standing in a place near where we was going to place the motor, and he had told me previously that the——

Mr. Mellen: I object to this conversation.

Q. Keep your voice up.

The Court: Make believe you are on the building.

A. O.K. At that time he told me to pull two guides together, those two guides was supposed to 194
be for backing up the other two guides that was usesl for bucket. We were going to bolt them together and cut them to exact measurement.

Q. Did you then leave Sadrakula? A. Well, Mike Secola and Mr. Murray and I, we was standing there talking and he said, "Well, all right. Now, go ahead and bolt them guides together."

By the Court.

Q. Who said that? A. Mike Secola: he was my foreman.

Mr. Mellen: They referred to him as Nick Secola, meaning the same person as the deceased. 195

A. (Continuing) Then he said, "All right now. Go ahead, bolt the guides together," and with that he picked up a stick, a long stick that he had prepared previously to use as a measurement.

Mr. Mellen: I object to this, if your Honor please.

196 *Frank A. Benson—For Plaintiff—Direct.*

The Court: "He picked up a stick." I will allow that.

Mr. McCarthy: These gentlemen over here say they can't hear because of the noise.

The Court: I will have it read if necessary.

By the Court.

Q. He picked up a stick and what else? A. He picked up a long stick that he was going to use for that purpose——

The Court: Strike that out.

197

Q. Then what happened? A. With that, I stooped down. I had the guide all ready and I bolted them two guides together and he walked away and I never saw him since.

By Mr. McCarthy.

Q. At the time that you turned around, did you leave him with anyone? A. With Mr. Murray.

Q. Then you turned around and went about your work, is that right? A. Yes, sir.

Q. Then some time after was your attention called to the absence of Secola? A. Yes, sir.

Q. How long after the time that you turned away was your attention called to the absence of Secola?

198 A. About one minute.

Q. Tell us how your attention was called to his absence. A. Well, he gave me instructions to bolt them two guides together and the two bolts that we was using was protruding through the guides so far, so in using it, for that purpose that he was going to do, it left a space in between the guides about that much. I figured on taking and remov-

ing the bolts and use spikes which will leave a flusher face like this. So I jumped up quick and I rushed over and I was going to tell him about it, and I says to Mr. Murray, "Where is Mike?" That is using my own words.

Q. Then what happened? A. Then I walked over to the ends of the forms and thought—I thought at the time that he walked around in my absence.

Mr. Mellen: I object to that.

Mr. McCarthy: I will consent that that be stricken out.

The Court: Let him finish. And what?

The Witness: I thought he walked around 200
the ramp and down——

Mr. McCarthy: Don't——

The Court: That does not hurt you any. Go ahead.

Q. So what? A. So I thought he walked around, going down to the sub-basement and I looked over and I saw him laying there.

Q. Now, I show you this picture, Plaintiff's Exhibit 2, and I ask you if that is a fair and accurate reproduction of the guide-rails and the position of the bucket as it existed on the day of the accident? A. Yes, sir.

Q. Where was Secola?

201

The Court: Where was his body?

Mr. McCarthy: He was still alive for the time being.

The Court: It is still his body.

Q. Where was his body at the time that you saw him downstairs? A. Well, he was laying on his back face up, facing southwest, more west close to the bucket.

Q. Where was his head, over toward the river? A. Yes, towards the river.

Q. He wasn't in the bucket? A. No, sir.

By the Court.

Q. Feet towards the bucket, you say? A. His feet towards the bucket, close to the bucket as I remember.

Q. Let's see here. Can you take this pencil and put the pencil about in the position which you saw his body? (Plaintiff's Exhibit 2.) Let the rubber end be the head. Which way is the body now? A. Just like this.

203

Q. Like that? A. Yes.

The Court: Do you get it?

Mr. McCarthy: Yes.

Mr. Mellen: Does the rubber represent the head?

The Witness: That is his feet.

The Court: Then we will put the point up there.

A. That is exactly how he was laying.

Q. Just like that? A. Yes, sir.

The Court: Should I draw a diagram there?

204

Mr. Mellen: I would be glad to have it, your Honor.

Q. His feet there and his body running like that? A. Very close, in that position.

The Court: I have drawn an arrow and the arrow part is the feet part and the body extending towards the bottom of the picture.

Q. Will you tell us this: Was it underneath the place where the bucket was or within that panel—I will withdraw it.

The Court: Show that to the jury. The arrow points to the feet. He said approximately that position (Exhibit 2 was then handed to the jury).

By Mr. McCarthy.

Q. Did you do anything after you looked down and saw Secola? A. We run down, Mr. Murray and myself, and saw him laying there.

Q. Did you go downstairs? A. No, we ran 206
around the ramp.

Q. You went around the ramp? A. Yes, that is right.

Q. Was anybody else there with Secola at that time? A. Well, there maybe had been somebody else, but I can't remember.

Q. When? A. At the time we come down there. Somebody come over after, but I went away.

Q. I mean at the time that you and Murray went downstairs, were you the first to be there? A. Yes, sir, we were the first.

Q. Did you see anybody else there at the time? A. No, sir.

Q. What did you do? A. Well, I was going to 207
call up an ambulance——

Q. All right. You did something. Did you go some place? A. Yes, I was going over to the office for—Mr. Carrick's office.

Q. Going to make a telephone call? A. Make a telephone call.

Q. Did you see someone there at the time that you went in? A. Yes, there was a timekeeper.

208 *Frank A. Benson—For Plaintiff—Direct.*

Q. Is he in court? A. Yes, I saw him pick up the receiver and call.

Q. No, is he in court, the timekeeper?

(A man arose.)

Q. Is that the man you saw? A. Yes, that is right.

Mr. Mellen: Allen.

Q. Where was he when you saw him for the first time and told him about this accident? A. He was just a little ahead of me going to the office.

209 Q. In reference to the office, was he near the office or near the scene of the accident? A. No, near the office.

Q. Which way was he facing at the time that you saw him?

Mr. Mellen: I don't see what materiality this has.

Mr. McCarthy: All right. We will get to that later.

Q. At the time that you were working there on the first floor were you working alone or was someone working with you? A. Well, there was another man there, too.

Q. What is his name? A. Hemsoth.

210 Q. Is he in court?

(A man arose.)

Q. Is that the man back there on the second row? A. Yes, that is right.

Q. He was working under you, is that right? A. Yes.

Q. He is not working for the United Hoisting Company now? A. No, not now.

Mr. Mellen: That is objected to.

The Court: I will allow it.

Q. Did you know before to-day or yesterday where he was working, did you know yesterday before you come to court where Hemsoth was working? A. Well, I know——

Mr. Mellen: I object to it as immaterial.

The Court: Sustained.

Mr. McCarthy: That is all.

212

By the Court.

Q. Was the body, the position of the body—do you know what a panel is in a bay, don't you? A. Yes, sir.

Q. The bay is the larger place, isn't it? A. Yes, sir.

Q. And the panel is a portion of a bay? A. Yes, sir.

Q. Was the body in part of the bay in which the hoist was, that is, under the bay where the hoist was?

Mr. Mellen: Under the panel I think you mean.

The Court: Under the panel. 213

Mr. Mellen: The panel is a part of the bay.

The Court: I understand that.

Q. The feet were toward the bucket? A. Yes, sir.

Q. And extending back away from the bucket, right? A. Yes, your Honor.

The Court: All right.

Cross-examination by Mr. Mellen.

Q. Mr. Benson, this hoist was just at about the middle of the bay, wasn't it? A. Just about the middle.

Q. And the bay was roughly 30 feet east and west and 20 feet north and south, isn't that about right? A. Well, I think there was one bay 30 feet.

Q. We are talking about this particular bay. A.
215 Yes, I think it was.

The Court: About what?

Q. About 30 feet east and west and about 20 feet north and south? A. That is right.

Q. And the bucket itself was only about 55 inches square, isn't that right? A. Yes.

Q. And the rails east and west were just 55 inches apart? A. Yes.

Q. They were about in the middle of that bay, is that right? A. About in the middle of that bay. Well——.

Q. Just a second. There was a middle panel in that bay, is that right? A. Yes.

216 Q. And the hoist was in the middle of that middle panel? A. No, it was not in the middle of that panel.

Q. Well, approximately that— A. It looks that way but it is 22 inches from the flange of the beam on one side, because——

Q. Look at Plaintiff's Exhibit 1. Isn't that hoist about in the middle of that middle panel? A. I will explain that if it is necessary.

Q. Well, all right. It was in some part of that middle panel, we will put it that way. A. Yes.

Q. The plank that you have marked here with a "1" was across that particular panel? A. Yes.

Q. Across that panel? A. Across the panel.

Q. And it was right back of the rail, that is, the westerly rail? A. That is right.

Q. And the plank was right back of it, is that right? A. Yes.

Q. Down on the ground, the sub-basement level, the bucket took up all of the space, filled all of the space down there between the two rails, didn't it? 218
A. Yes.

Q. And that particular plank was just about above where you saw—this plank that you marked "1" was just about above where you found his feet? A. That is right. The bucking piece was directly above there.

Q. The bucking piece was directly above where his feet were, is that right? A. That is right.

Q. The bucking piece on which that particular rail was attached, is that right? A. That is right.

Q. You and Hemsoth were the two riggers on that job that worked under Sadrakula? A. Yes.

Q. Isn't that right? A. Yes, sir. 219

Q. And when you came on the job, the first thing that you three men started to do was put in the guide rails for this particular hoist? A. Yes, sir.

Q. And where did you start putting, from the ground up or did you start at the top and drop them down? A. We started about 6 feet below the bucking piece.

Q. Below which bucking piece? A. On the ground floor level.

Q. Well, then, the very first thing that you did when you came on that job was to put in one of the bucking pieces on this level here shown in Plaintiff's Exhibit 1, is that right? A. What was the question?

Q. (The question was read by the reporter.) A. Yes, sir, we set the first bucking piece exactly and we worked from that on.

Q. That is the very first thing when you first came on that job, whatever day it was? A. Yes.

Q. You went in there and put in one of the bucking pieces on that floor above the bottom? A. The first thing we do, we get the location and then we put in the bucking piece accordingly.

Q. On this particular job which bucking piece did you put in first, the easterly or the westerly bucking piece? A. That was put in the day before.

Q. Whether it was the day before or a week before, which one did you put in first, the east or the west? A. That don't make no difference.

Q. Which did you? I don't care whether it makes any difference or not. A. Sometimes we put on the east and sometimes on the west.

Q. Do you remember which one you did on this job? A. No, sir, because I didn't put them in.

Q. Well, who did put them in? A. There was another man who put the first two floors——

Q. Hemsoth? A. No, I don't think he was there. Yes, that is right.

Q. Weren't you there the first day that the hoist company started to work on putting in these rails? A. I don't know who was there at first. Mike Secola put that in himself.

Q. You think he put the first one in himself? A. Yes.

Q. When you first came on the job, had this hopper or bin, rather, that shows on Plaintiff's Exhibit 1—was that there when you first came on the job? A. No, sir.

Q. When you first arrived on the job and before these bucking pieces were put in, were there any of these planks or boards that you have talked about that show in the picture in that bay? A. That is the way it was all the time then.

Q. When you first came on the job? A. Yes.

Q. Before there was any bucking pieces put in? 224
A. Mike Secola put the bucking pieces in so I can't answer that question.

Q. You don't know? A. I don't know.

Q. Then after the bucking piece was put in on that floor, did you put some in on the floors above? A. The floors above, yes.

Q. How many floors above? A. Only one floor.

Q. Well, then, the other bucking piece was not placed until after the rail was up on one side, part way up? A. That is right.

Q. Is that true? A. That is right.

Q. And then afterwards you put in the other bucking piece after the rail and the bucket were in place? A. Yes.

Q. Who put this other bucking piece in place on 225
this floor shown in Plaintiff's Exhibit 1? A. We put that in.

Q. What? A. I put that in.

Q. At that time when you put that bucking piece in, were the planks here as they are shown in this picture? A. Yes.

Q. Sadrakula was with you at that time, was he? A. Yes.

Q. When was that, the day before the accident or the same day as the accident? A. That was the same day I think.

Q. That you put that bucking piece in, is that right? A. In the morning.

Q. So this bin that shows in Plaintiff's Exhibit 1, was that put in the same day as the accident? A. Before 9 o'clock in the morning.

Q. Of the same day as the accident? A. Yes.

Q. That is correct, is it? A. Yes, sir.

Q. And was that put in by you and your men? A. Mike Secola and myself and I don't remember
227 who the other one was.

Q. There was nobody working on that floor on the day of the accident right around the bay where the hoist was and the bay where the bin was except the hoist company men, isn't that right? A. No, there was nobody else there. There was other people there but——

Q. Around those bays?

The Court: At those bays there was nobody else working?

The Witness: No, I don't think so.

Q. There is a ladder in this Plaintiff's Exhibit 1. Do you say that that was there at the time of the accident, just before the accident? A. It was
228 there, yes, sir.

Q. When did you first see that ladder there? A. I saw that the first thing I came there.

Q. That morning? A. That morning.

Q. On the day before, did you see that ladder there? A. Yes, sir.

Q. I thought you told us a minute ago that you didn't remember what, if anything, was around

that bay before you men started to work when you first went in there? A. I misunderstood the question then.

Q. Well, now, go back to that. This floor level, this bay, when you first came on the job before you and the other hoist men had done any work at all, was there anything across the steel in that bay? A. Nothing except that.

Q. Except what? A. Except what shows on the picture.

Q. What shows on the picture? A. Yes.

Q. So that from the time you first came there the morning, as you say, the morning of the day before the accident until the time of the accident, 230
none of this stuff that shows in the picture had been moved at all? A. No, sir.

Q. Not moved a sixteenth of an inch? A. Oh, well, maybe a sixteenth of an inch.

Q. Who moved it? A. We maybe walked across it and may have moved it that way, but it was not moved by hands.

Q. As far as you know? A. As far as I know, right.

Q. This plank, did you see anybody put this plank that you have marked with a "1" on here? A. No, sir.

Q. That was right alongside of the bucking piece, wasn't it? A. Right alongside or the guide, 231
above the bucking piece.

Q. Above the bucking piece? A. Yes.

Q. When that bucking piece was put there—withdrawn. You say that that plank was directly above the bucking piece? A. Not quite directly above the bucking piece.

Q. Was some part of it above the bucking piece? A. Yes.

232 *Frank A. Benson—For Plaintiff—Cross.*

Q. Well, then, that plank wasn't in that position when the bucking piece was put in, was it? A. Well, I don't know nothing about that.

Q. The bucking piece is put down from that floor down and rests in the flange? A. Yes, that particular bucking piece I did not put in so I don't know. There must have been there.

Q. I thought you told us a minute ago that you put in one of the bucking pieces but you didn't remember which one? A. I understood the question was for the floor above.

Q. No, on this floor which bucking piece did you put in? A. I didn't put in any of them on that
233 particular floor.

Q. Didn't you tell me just a minute ago that Sadrakula put in one of them on that floor? A. Yes.

Q. Now, listen to me.

The Court: Don't get angry. You don't usually do that.

Mr. Mellen: I am sorry.

The Court: I know you get tired toward noontime and we will have a recess in a little while.

Q. Didn't you tell me just a minute ago that Sadrakula put in one of the bucking pieces, the
234 first one that was put in on that job? A. The first one west on the ground floor.

Q. All right then. It was west, is that right? A. Yes.

Q. You know the method of putting in those bucking pieces, don't you? A. Yes.

Q. You know how it is done? A. Yes, sir.

Q. You know that it couldn't be put in if there was a plank resting on top of those beams partially above where the bucking piece was? A. Yes, can be put in.

Q. Could be done? A. Yes.

Q. Wouldn't it be much more convenient to move the plank?

Mr. McCarthy: I object to that, if your Honor please.

The Court: Sustained.

Mr. Mellen: I respectfully except.

Q. Well, did you fasten the rails to that westerly 236
bucking piece on that floor? A. Mike Secola himself.

Q. He himself did that? A. Yes.

Q. Did you see him do it? A. No.

Q. When was that done? A. The day previous to that day some time; I don't know when.

Q. Did he stand on that plank when he was doing that? A. Well, I couldn't tell you because I was not there.

Q. How do you know he did it then? A. He said he did it.

Q. What part of the building—withdrawn. You and Murray were a distance away from the hoist the last time that you saw Sadrakula, were you? A. Yes. 237

Q. And Hemsoth was with you at that time, was he? A. Yes, he was with us all the time.

Q. That is, there was Hemsoth and you were working on splicing these rails? A. Yes, sir.

Q. And Murray was an electrician, wasn't he? A. He is chief electrician, yes, sir.

Q. He had nothing to do with putting these rails together? A. No.

Q. He just happened to be there? A. Yes.

Q. After Mike, as you call him, left and you went to look for him? A. Yes, sir.

Q. And you saw Murray? A. What?

Q. You saw Murray, did you? A. Yes, sir.

Q. And you asked—I believe, you said you asked Murray where Mike was? A. Yes.

Q. Did Murray tell you? A. We looked up and I didn't pay much attention to it.

Q. Did you and Murray together look around and finally find him, is that it? A. Yes, sir.

239

Mr. Mellen: That is all.

Redirect examination by Mr. McCarthy.

Q. When you say you looked around, where do you mean that you looked; when you said that you looked around for Mike, where did you say you looked? A. Well, I walked over to Murray first and he was a little back of me, and then I hurried on and looked towards the bucket and I saw him laying down in the basement.

Q. You went right over, you mean to the girder; did you come to this part? A. Yes, almost to that part, that is the big girder.

240 Q. Then you saw his body down below, is that right? A. Yes, sir.

Q. Where was Murray standing in relation to where Mike was and where you were? A. Well, approximately 20 feet from the guide rail there west, that would be where we would place the motor.

Q. Who was there? A. Mr. Murray.

Q. Where were you in relation to where Murray was? A. About 10 feet farther west than that at the time.

Mr. McCarthy: All right.

HAROLD A. MALKIN, 105 Arden Street, Borough of Manhattan, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

242

Direct examination by Mr. McCarthy.

Q. Mr. Malkin, what is your business? A. I am a licensed engineer and land surveyor.

Q. Are you a photographer as well? A. Yes, sir.

Q. And are you in the business of taking pictures and making surveys? A. I am.

Q. And were you in that business during the month of October, 1935? A. I was.

Q. And did you at the request of someone, don't tell us who, take these two pictures which have been introduced in evidence and made part of the record in this case and identified as Plaintiff's Exhibits 1 and 2? A. I did.

Q. Will you tell us on what date you took them? 243
A. On October 26th, 1935.

Mr. McCarthy: That is all.

Cross-examination by Mr. Mellen.

Q. What was that you referred to, to get the date? A. The order and time I took it.

244 *Harold A. Malkin—For Plaintiff—Cross.*
James Murray—For Plaintiff—Direct.

Q. Is that a record you made? A. Yes.

Q. What time of the day did you take it? A. Before noon, about 11 o'clock.

Q. About 11 o'clock? A. On October 26th, 1935.

The Court: That is two days after the accident.

Mr. Mellen: That is all.

The Court: We will now recess until 2 o'clock.

(The Court then recessed until 2 o'clock.)

245

AFTERNOON SESSION.

(The trial was continued.)

JAMES MURRAY, 2821 LaSalle Avenue, Borough of the Bronx, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. McCarthy.

Q. Mr. Murray, will you keep your voice up, please, so that these people here can all hear you? What is your business? A. I am an electrician.

246 Q. By whom are you employed? A. The United Hoisting Company.

Q. Were you so employed in October, 1935? A. Yes, sir.

Q. Were you working on this job of the Federal Office Building with Mike Secola on the day that he was killed? A. Yes, sir.

Q. How long before that day had you been working on that job? A. About two days.

Q. What was your particular duty down there on that job, will you tell us? A. Well, we run the electric cable from the Edison box over to the electric machine that hoists up the bucket.

Q. You had occasion during the course of that time to be on the lowest basement floor, didn't you? A. Oh, yes, sir.

Q. And had you occasion during that time to be on the floor immediately above that, didn't you? A. Yes, sir.

Q. On the day before the accident to Secola, do you remember the condition of the bay in the area 248
of which the guide rails were being constructed? A. Yes, sir.

Q. You know by the bay I mean all the area within the four erect columns, is that right? A. Yes, sir.

Q. Do you remember the condition there on the day before or the two days before when you first went there in relation to planks over the beams in the vicinity or in the bay in the vicinity of the guide rails? A. Yes, sir.

Q. Well, will you describe the condition to us generally as you remember it two days before the accident when you first went there? A. Well, up where the electric motor was going it was on that 249
bay and we had to bring our wires around and there was a ladder and a plank and there may have been another beam or so there.

Q. I show you a picture which has been introduced in evidence and is part of the record in this trial, Plaintiff's Exhibit 1, and I ask you if that

250 *James Murray—For Plaintiff—Direct.*

picture fairly and accurately represents the condition on the first floor above the basement floor at the time you first saw it? A. Yes, sir.

Q. Now, Mr. Murray, you have seen that picture before, haven't you? A. Yes, sir.

Q. I show it to you the other day. A. Yes, sir.

Q. And did the condition that is represented in this picture continue up to and including the time that Secola had his accident from which he died? A. Yes, sir.

Q. Was it substantially that way, might have been a few changes do you mean or always that way? A. It was there while I was working there.

251 Q. Now I show you this picture of the basement floor, that is the floor where the bucket was, and ask you if that is a fair and accurate representation of the position of the bucket in reference to the guide rails on the day of the accident? A. Yes, sir.

Q. That is what it looked like? A. Yes, sir.

Q. Did you happen to be in the company of Secola at the time or just before something happened to him? A. Yes, sir, I was talking to him.

Q. You remember that something did happen to him, do you? A. Oh, yes.

Q. When and where and under what circumstance do you tell us that you were talking to Secola just before something happened to him? A.

252 We were standing on the floor above the basement.

Q. When you say "we" who do you mean? A. Mike Secola and Mr. Benson.

Q. And who else? A. That was all I recollect.

Q. Were you there? A. I was.

Q. All right. What happened? A. So I called him Secola because that was his name.

Q. That is what you nicknamed him you mean? A. Yes. He said to Mr. Benson, "All right, go ahead and cut the guide rails." So Mr. Benson turned to do his work.

Q. Which direction did he turn to or go into; referring to Benson? A. Well, Benson turned north and Mike and I stood there and he told me he was going to take a measurement of a guide.

Q. Did he have anything with him? A. He had a stick, so he walked, turned right about face and walked toward the guide rails.

By the Court.

254

Q. Who did? A. Mike Secola.

Q. Walked toward the guide rails? A. Yes.

By Mr. McCarthy.

Q. That is, the guide rails that are shown in this picture here? A. Yes, sir.

Q. He walked from the foreground of this picture then toward the back? A. Yes, sir.

Q. Did you watch him? A. Yes, sir.

Q. How long did you watch him? A. He walked out over the ladder and there was a plank there and he stood on the plank.

Q. Now, I show you this picture, Plaintiff's Exhibit 1, and I ask you if you can identify the plank that you say he walked onto, see if it is there? A. 255
There.

The Court: We will put a mark on it. Let's see it. We will put an "M" on it for Murray.

By the Court.

Q. Which one is it here? A. This one.

Q. This big one or the short one? A. This one that extends out here.

Q. Where did he stand, do you know? A. Right there (indicating).

The Court: All right. We will put an "M" at the place where he said the deceased was standing. Show that to the lawyers and show it to the jury.

By Mr. McCarthy.

257 Q. How long had you known Secola? A. Ten years.

Q. You both had been working for the same company during that time? A. Yes, sir.

Q. How did he appear to you physically?

The Court: There is no dispute about that.

Mr. McCarthy: I mean particularly on the day of the death. What were his spirits or his frame of mind?

The Court: Do you think there is a claim that he committed suicide?

Mr. McCarthy: Oh, Lord, no.

Mr. Mellen: I should say not.

258 Mr. McCarthy: All right.

By the Court.

Q. Did you see him fall? A. No, sir.

Q. You didn't. How long after you saw him on that plank at the place where we marked the "M" was it that you looked and didn't see him again?

Mr. McCarthy: Just a minute, please. I would like to lead up to that, if your Honor please. I think that something happened before he did turn around to look.

The Court: All right, but I thought you were through.

Mr. McCarthy: No, I hadn't——

The Court: Excuse me. Go right ahead.

By Mr. McCarthy.

Q. Tell us, how and when was your attention called to anything happening to Mike Secola? A. When I last seen him he was on the plank and then 260
I turned to pick up the electric wire, and I was on my knee when I heard a grunt.

Q. Did you hear anything else? A. No. So looking——

Mr. Mellen: The answer is no.

A. Looking backwards offhand I heard a cry from Mr. Benson. He said, "Where is Mike?"

Q. What did you do? A. I immediately got up and we went to the end to look over.

Q. What did you see? A. He was laying on his back down on the basement floor.

Q. Where was his head and where were his feet at that time? A. Where was what?

Q. Where was his head and where were his feet 261
at the time that you saw him? A. Well, his feet was towards the guide rails.

Q. Where was his head? A. Laying westward.

Q. That is over toward the river away from the bucket, is that right? A. Away from the guide rails.

Q. Where in relation to the guide rails were his feet? A. What is that?

Q. Where in relation to the guide rails of the bucket were the feet of Secola? A. About 3 feet.

Q. Away from it? A. West.

Q. The head was farther away than that? A. Farther away, yes.

Q. Then what did you and Benson do? A. When we seen him laying there, there was a ramp where the trucks went down, we ran down the ramp and on the way down I met the superintendent for Atwell Construction. I says, "Get an ambulance, the man fell down." Then I went down.

263 Q. Then you went down and you stayed there with him, did you? A. His legs were zigzagged and I tried to hold him down. He wanted to roll over.

Q. Was anybody else there at that time except you and Benson? A. Well, I seen Benson but in the excitement I was leaning over holding him there and I didn't take notice to who was around.

Q. At the time that he was out on the plank that you marked with the letter "M" did you see him do anything or did you just see him walk out on there? A. He had a stick, a measuring stick.

Q. Did you see him measuring anything? A. No, I didn't.

Mr. McCarthy. That is all.

264

Cross-examination by Mr. Mellen.

Q. When you got down to him after he had fallen, he was moving, was he? A. No, sir, he was laying still but he wanted to turn over.

Q. When you say he wanted to— A. He made an attempt.

Q. His body was moving? A. Yes, sir.

Q. And you were keeping him from doing it? A. Yes, sir, I tried to hold him down.

Q. You told us that you were an electrician? A. Yes, sir.

Q. This bucket hoist was to be operated by electricity, was it not? A. Yes, sir.

Q. And for that purpose there was to be an electric-powered motor with a drum on which there would be a cable? A. Yes, sir.

Q. And in this building that motor was going to be installed on this floor which appears here in Plaintiff's Exhibit 1 (handed to the witness)? The same floor from which Mike fell? A. Yes, sir. 266

Q. It was going to be installed in that part of the panel immediately west or back of the hoist rails? A. Yes, sir.

Q. In this section of the panel across which there are some planks and a ladder? A. Yes, sir.

Q. In that section? A. Yes, sir.

Q. The cable which would operate the bucket would run up, that was attached to the top of the bucket, was it not? That is, it would be when it was completed, attached to the top of the bucket in about the middle of the space between the two guide rails, do you understand what I mean? A. Well——

Q. We will get it this way: In this photograph, Plaintiff's Exhibit 2, there is a picture of the bucket? A. Yes. 267

Q. In the top of that bucket there is a section that runs across the tip and there is a hole in the middle of that top piece? A. Yes, sir.

Q. And that cable that would lift it up and down would be attached into that? A. Well, the riggers would do that.

Q. I don't care who did it, but that is the way it would be when it is finished, isn't that right? A. That wouldn't be my kind of work.

Q. You have seen it done lots of times, haven't you? A. Yes, sure.

Q. Now that is the way it would be done? A. Yes, sir.

Q. Your work had to do with the installation of the motor and of the machine that would operate the hoist, didn't it? A. Yes, sir.

Q. And would the placing of this motor be eventually a part of your job or just the electrical connections? A. Just the electrical connections.

269 Q. You were at that particular time running the cable over in the Edison Service to a point near this bay? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. That would be connected with this motor? A. Yes, sir.

Q. When it was eventually installed? A. Yes, sir.

Q. When you last saw Secola he was standing at the place that you have marked "M"—this plank that shows in the photograph— A. Yes, sir.

Q. Plaintiff's Exhibit 1. Do you remember the size of that plank? A. It was two by eight, I believe, an ordinary building plank.

Q. Regular building plank? A. Yes, sir.

270 Q. And how close was that plank to the guide rail? A. I didn't go out to see that. I knew he was standing on that plank. I don't know how close it was to the guide rail.

Q. It appeared to be right close to it, didn't it? A. Undoubtedly, because he was going to measure that guide rail.

Q. When you saw him he had this stick? A. Yes, sir.

Q. In his hand. About how long was that stick? A. Oh, maybe 15 feet, 10 feet, I didn't measure it.

Q. When you saw him standing there before you went on with your work, was he standing upright, was he stooped over or what position was he in? A. He went to take the first foot on the plank, he went to take his first foot on the plank.

Q. You have said that he was standing on the plank? A. One foot from the iron girder on the plank. In other words, he just got off the iron girder onto the wooden plank when he stood there.

Q. Did he have one foot on the plank? A. Two feet. 272

Q. Two feet on the plank? A. Yes.

Q. Both feet on the plank? A. Yes.

Q. Was he standing upright or was he leaning over? A. Upright.

Q. Did he have the stick in his hand at the time? A. Yes, sir.

Q. Was he holding the stick up in the air? A. No, I didn't see that.

Q. You noticed the stick in his hand? A. Yes, sir.

Q. Did you notice in what position it was held in his hand, whether it was upright or sideways? A. Straight. 273

Q. Straight up and down? A. Yes, sir, in the left hand.

Q. Vertical position? A. Yes, sir.

Q. Left hand? A. Yes, sir.

Q. Did you notice whether he was holding that against the guide rail or any part of the guide rail? A. Not up to that—I turned.

Q. You turned? A. I turned.

Q. When you saw him there you were back in the bay to the west of where he was? A. Yes, sir.

Q. And did you turn around and face to the west again and go on with your work? A. Yes, sir.

Q. And you had gotten down, kneeled and started to work? A. Yes, sir.

Q. And then you heard the grunt? A. I heard the grunt, yes, sir.

Q. You said that his feet were about 3 feet from the bucket when you got down there, when you saw him after he fell? A. Yes, sir.

275 Q. Did you notice that when you were still up on the first floor, on the first tier of steel or when you got down into where he was? A. When I looked over I seen him laying there with his head towards the west.

Mr. Mellen: That is all.

Redirect examination by Mr. McCarthy.

Q. Was he moving at the time you first looked down through the planks and saw him, was he moving at that time? A. No.

Q. When did he start to move? A. When I got to him he was still.

Mr. McCarthy: All right. Thank you.

276

Recross-examination by Mr. Mellen.

Q. You said that when you got to him you had to hold him still? A. No, when I was there; when I got there he was still but when I seen him move I held him there.

Q. After you got there you saw him? A. After I seen him try to turn over, because his feet was in a zigzag shape and I thought they were broken and I didn't want him to move until the doctor come.

Q. His feet were drawn up? A. Kind of zigzagged, you know.

Mr. Mellen: That is all.

Mr. McCarthy: At this time, your Honor, I wish to read from an examination before trial of JOHN FINNEGAN, taken in 165 Broadway, January 25th, 1937. Reading 278
from page 3:

"Question: On the 24th day of October, 1935, Mr. Finnegan, what was your employment? Answer: Superintendent of construction with the James Stewart & Company.

"Question: On that day, Mr. Finnegan, were you employed on that particular building?"

Mr. Mellen: On any particular building.

Mr. McCarthy: "On any particular building?

"Answer: Yes, the Federal Office Building, located at Vesey and Barclay Streets.

"Question: And did you have charge of the entire construction of that building? Answer: Yes, 279
as explained later at page 18."

Page 6:

"Question: The second photograph"—which I will connect up—"that I showed you, what floor does that show? Answer: The first floor.

"Question: And do both photographs show that side of the building nearest West Broadway? Answer: Yes.

"Question: The second photograph which I have not marked yet shows the first floor proper, does it not? Answer: Yes.

"Mr. Jenkins: I am going to mark this photograph Plaintiff's Exhibit 2 for Identification."

Mr. Mellen: For the purpose of this trial, your Honor, that has become Plaintiff's Exhibit 1 and we now call it the first floor.

281 "Question: At the time of the accident, which would be October 25th, 1935, was the flooring on the first floor, was that laid down? Answer: Do you mean the basement floor?

"Question: Any floor.

"The Witness: Not on the first floor.

"Question: In other words, aside from a number of planks, ladders or odds and ends, the floor was open steel work? Answer: Yes, that is the first floor."

Mr. Mellen: If your Honor please, I am going to object to that. That place counsel has said before, there was a lot of difficulty 282 about what was the first floor and what was the basement floor. At that particular point of the examination the witness asked if counsel was referring to the basement floor, and——

The Court: He has not read that to me

Mr. McCarthy: Yes, I said: "Do you mean the basement floor? Question: Any floor. The Witness: Not on the first floor."

The Court: Meaning?

Mr. Mellen: Meaning what? I don't know.

The Court: Well, the jury will have to take it for what it is worth. I can't tell. You have allowed this confusion. I don't say you. It may have been inadvertent. It started here until I tried to rectify it.

Mr. Mellen: The confusion, I think, came about in the first place—probably Mr. Jenkins, he had the formula of the questions here. 284

Mr. McCarthy: There is no confusion at all. Here are the questions that Mr. Jenkins asked. He asked him this question: "The second photograph which I show you which I have not marked yet shows the first floor proper, does it not?" He said, "Yes."

The Court: I think that is all right.

Mr. Mellen: I respectfully except.

The Court: Anything else?

Mr. McCarthy: Just one thing more. Page 14:

"Question: Was there anything for the workmen on the first floor to stand upon except the girders? Answer: I don't know. There may have been some planking there that workmen walked on." 285

The Court: Read that again.

Mr. McCarthy: "Question: Was there anything for the workmen on the first floor to stand upon except the girders? Answer:

I don't know. There may have been some planking there that workmen walked on."

Mr. Mellen: If your Honor please, the point is this: The fact that there is confusion is obvious from the fact that the testimony of the plaintiff's own witnesses is that there was flooring in over a large part of what has been referred to here as the floor from which the plaintiff fell.

The Court: The flooring to a large part?

Mr. Mellen: Yes, that is the testimony of Moran. It is the testimony of Benson.

Mr. McCarthy: No flooring at all.

287 Mr. Mellen: Not in that particular bay.

The Court: Well, I know, but it was the duty on the examination before trial of the counsel who represented the defendant to have clarified this examination. I must accept it unless there is objection to the question on legal grounds and I don't see any and it is not stated by you to be a legal basis for its exclusion.

Mr. Mellen: That is true.

Mr. McCarthy: One more question and then I will be through with this, your Honor. Same page, following question:

288 "Question: Did yourself as superintendent of construction order any planking to be made on the first floor? Answer: No."

Now, at this time, if your Honor please, I ask you to take judicial notice——

The Court: You don't have to call my attention to it.

Mr. McCarthy: Section 241, subdivisions 4 and 5.

The Court: I will take judicial notice of both of them but I have my doubts as to the applicability of 5.

Mr. McCarthy: I agree with you.

The Court: Then we will just consider it under 4.

Mr. McCarthy: Under 4. And also I believe in that respect you might also consider taking judicial notice of Chapter 5, Article 10, Section 196 of the building code. I have already put the marker there for your Honor.

The Court: What one is that?

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Mr. McCarthy: That is Section 196 of Article 10, Chapter 5.

The Court: I don't think so. I think in the interest of safety, I think you had better stay on 4, don't you?

Mr. McCarthy: I agree with you.

The Court: That is subdivision 4 of 241 of the Labor Law.

Mr. McCarthy: That is right, sir, and I also ask your Honor to take judicial notice to the effect that that Section 4 as reproduced in 241 of the present labor law was derived in toto from the fourth sentence of the former Section 20 of the Labor Law which went into effect in 1909 pursuant to

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the laws of this State, Chapter 36.

The Court: We are not concerned with that. That is a matter of law.

Mr. McCarthy: At this time, your Honor, the plaintiff rests.

Mr. Mellen: Do I understand then that plaintiff now is resting solely upon a claim

of a violation of subdivision 4 of Section 241 of the Labor Law?

The Court: Right.

Mr. McCarthy: Not completely, your Honor, I contend that as a matter of common law in the interests of safety and protection there was still a duty owing.

The Court: I am going to hold you to 241.

Mr. McCarthy: I will regret that I must have it noted on the record that I go in not only on the violation of the labor law, but also on the ordinary provisions of the common law regarding the negligence of a person inviting others to come to work on premises under their jurisdiction and control.

The Court: All right, if you want it. I think it only complicates it but you can do it if you like. You see what I am calling your attention to, Mr. McCarthy? If you have the common law you may have the question of contributory negligence. If you have the labor law you may not have it.

Mr. McCarthy: That is right, sir. I have given your those cases.

The Court: I am perfectly familiar with them.

Mr. McCarthy: Yes, sir, thank you.

Mr. Mellen: On behalf of the defendant I move to dismiss the complaint on the ground that the evidence is insufficient in law to establish any actionable negligence on the part of that defendant which was the proximate cause of the accident which resulted in the

death of the deceased; on the specific ground that Section 241 of the Labor Law of the State of New York has no application, for the reason that the place of the accident, both the building under construction and the land upon which it was being constructed, were within the exclusive jurisdiction of the United States by virtue of the United States Constitution, Article 1, Section 8, Clause 17; that under the evidence, exclusive jurisdiction over the place of the accident had been ceded to the United States more than about four years prior to the accident, and that for 296
that reason no statute regulating the construction of the building, such as the labor law here, would apply.

Upon the further ground that under the evidence adduced there is nothing to show even prima facie any violation of subdivision 1 of Section 241 or that any such violation was the proximate cause of the deceased's fall, or violation of any common law duty owed by the defendant to the deceased, or any duty imposed by the labor law and that there is no evidence to establish that the violation, if there was one, of the labor law, was the proximate cause of the fall.

The Court: Motion is denied. 297

Mr. Mellen: I respectfully except. Now do I understand that I am to proceed only on the theory that the sole question presented is under the labor law?

The Court: Mr. McCarthy says he wants to go under common law, too.

Mr. McCarthy: I prefer to go—in view of the objection which I knew he would make and particularly bearing in mind the decision of Kaufman against Hopper, which is before your Honor—I want to go in not only on the violation of the labor law, but also on the common law violation of the duty which was owing by this contractor to this deceased.

Mr. Mellen: Of course I submit, under the authorities that are already before your Honor, that the relationship between the defendant and the deceased was such that
299 there was no duty of affirmative action at common law by this defendant for the protection of the man under the circumstances shown here, being open, obvious dangers that had existed.

The Court: That is a question of assumption of risk. That is a matter of defense, isn't it?

Mr. Mellen: It is more than an assumption of risk.

The Court: Let's see if we understand one another. At least there is a duty owing, isn't there, to this man by this general contractor?

300 Mr. Mellen: There is only, as I understand the common law—and I may be in error; if your Honor disagrees with me I undoubtedly am, but as I understand the common law, the only duty that a general contractor owes to the employees of a sub-contractor is the same duty that he would owe to any invitee upon the property, taking

into consideration the fact that the place is a building in course of construction and that therefore it is to be measured by the situation existing.

The Court: Oh, yes. This is my thought: reasonable care in the light of the condition which the building is in.

Mr. McCarthy: That is right.

The Court: Is that your statement?

Mr. Mellen: What I understand under the decisions to be the duty of an invitee, is to advise him; you don't have to change the place. You merely have to warn him, advise him of the existence of dangers that he 302
does not know of, or hidden dangers to protect him from.

Under the evidence here, there is no question of any hidden, concealed danger. These are conditions under the evidence that had existed from the time he first came on the building. He was there at least one day prior to the day of the accident and the day of the accident, so that the conditions were something that were open, obvious, not hidden; nothing in the nature of a trap, nothing that he didn't know and was not as well aware of as the——

The Court: Aren't you now getting into 303
the question of contributory negligence?

Mr. Mellen: I don't think so, your Honor, because the measure of the duty under the Restatement is governed by whether or not it is a hidden—in other words unless it is something that he doesn't know and shouldn't know as well as the person who invites him, there is no duty.

The Court: Did you have any case on common law liability?

Mr. McCarthy: Yes, I have the Kaufman against Hopper case, your Honor, 220 New York, which has to do with practically the same situation here.

The Court: You go ahead, Mr. Mellen. I will read the case meanwhile.

CARL G. EDLUND, 201 East 16th Street, Brooklyn, N. Y., called as a witness on behalf of the 305 defendant, being duly sworn, testified as follows:

Direct examination by Mr. Mellen:

Q. Mr. Edlund, in the fall of 1935, what was your business? A. Salesman for the United Hoisting Company.

Q. Did you have anything to do with this job at the post office in New York? A. I did.

Q. Were you an officer of the United Hoist at that time? A. I believe so. In other words, I don't just quite remember when I was voted out as vice-president, but at one time I was vice-president. It might have been within that period.

306 Q. How long had you been with the United Hoisting? A. Since its incorporation in 1926.

Q. Are you familiar with the equipment that was to be installed by the United Hoist Company in this building under the contract with Stewart? A. Yes, sir.

Q. The location of that equipment? A. Yes, sir.

Q. Were you at the job before the riggers came on the job to start the installation? A. Yes, sir.

Q. Who was with you when you were there, do you remember? A. Mr. Rizzi and Mr. Finnegan, I believe.

Q. I meant of the United Hoist Company. Were there others of the United Hoist? A. Nobody else from the United Hoisting Company.

Q. Do you recall whether Mr. White, Jr., was there? A. I don't think so. I don't remember. I won't say that he was there, but I don't remember now.

Q. One of the items of equipment that was to be 308
installed, we understand, was this concrete hoist? A. Yes, sir.

Q. When and who made the determination as to the location of that hoist in the building? A. Why, I should say that there were three men that finally came to that decision, and that would be Mr. Finnegan, Mr. Sartelli and Mr. Rizzi.

The Court: Sartelli, the deceased here?

Mr. McCarthy: No, that is another one.

The Court: You have used the name so interchangeably that I can't tell.

Q. Were you a party to the conferences that led up to that decision as to the location? A. Yes, sir. 309

Q. Had the location been determined before Sadrakula or Moran, who was the superintendent, and the riggers came on the job? A. Yes, sir.

Q. Besides the hoist, the bucket hoist, what other equipment was to be installed in the vicinity, in the same section of the building, in connection with that hoist? A. A bucket, concrete mixer, Blaw-Knox material bin and weighing batchers and floor hoppers.

Q. Now, the bay in which this hoist was to go was a corner bay of the end of that section of the building in which the steel had been erected and the ramp driveway; is that correct? A. I believe, if I recall correctly, it was the second bay from that driveway. I am not so certain of that, but I believe that, if I recall correctly.

Q. Well, at any rate, on the bay to the north of that—there is a picture here, Plaintiff's Exhibit 1, that shows a hopper of some sort, bin; was that part of your equipment? A. Yes, sir.

Q. Now, you said that there was a concrete
311 mixer. Where was that to be located? A. Alongside of the bucket on the sub-basement floor.

Q. Was it on the floor or above the floor?

Mr. McCarthy: I object to that. It is already answered, if your Honor please. The witness answered that the concrete mixer was——

Mr. Mellen: All right. I will withdraw the question.

Q. Do you remember whether the top of that concrete mixer, when installed, would be above or below the first tier of steel? A. It would be below the first tier of steel.

312 Q. And where was it with reference to the bin and the hoist bucket? A. It would be alongside of the hoist bucket and between the bin, somewhat under the bin.

Q. Well, do you recall that there were three panels in the bay in which the hoist was constructed? A. Yes.

Q. And the hoist was in the middle panel? A. Yes.

Q. Where with reference to the northerly panel would the mixer come? A. Directly underneath the northerly panel, alongside of the bucket.

Q. In the operation, after installation, the operation of the bin—withdrawn. Was the bin and the mixer and the hoist part of the same equipment that were used together after they were installed? A. They are all related one to the other. In other words, there is a sequence of operation there.

Q. In operating was there an operator that would work in connection with the bin and the mixer and the bucket? A. Yes.

Q. And where would he be stationed? A. Directly over the mixer. 314

Q. When stationed at the mixer, having in mind the location of the mixer and the height of the mixer, would there be clearance for a man to stand—withdrawn. Would his head extend above the level of the first tier of steel? A. It would.

Q. In other words, if the first tier of steel were filled in there, the man couldn't stand at the concrete mixer; is that right?

Mr. McCarthy: I object to that, if your Honor please. That is a conclusion on the part of this witness.

The Court: It depends upon the size of the man. 315

Q. Do you remember what the height of the first tier of steel was above the ground, approximately? A. Approximately about 13 feet, I should say; something like that.

Q. And will you describe on this particular job just what the construction of this mixer was, what it stood on, its size, and so on? A. Well, the lowest

point of the plant in operation would be the bottom of the bucket, which in this case rested on the cement floor of the sub-basement. Then the mixer would be cribbed up—in other words, there would be lumber placed underneath the mixer to raise that up so that the mixer in turn could discharge the concrete into this bucket that was resting on the cement floor of the sub-basement. In other words, if this were the bucket, the discharge chute of the mixer would be about in this relation. And then the bin, the Blaw-Knox material bin that received the stone and the sand for the concrete,
317 would be above the batch hopper or the receiving hopper of the mixer, so that when the material had been placed in this bin the man standing on the top of the mixer would pull two levers or turn two wheels. That would discharge the sand first into one compartment of the weighing batcher. He would pull another wheel, which would discharge the sand into the other compartment of the batcher. When enough of the material had poured into there so that it was the required weight for that particular batch of concrete, then the weighing batcher would come to a certain point and would shut off that material from the bin. The next step then would be that when the required amount of material had been put in these batchers, the lever—
318 another lever—would be pulled, which would discharge the stone and sand into the receiving hopper of the mixer, which in turn would guide it into the concrete mixer. It would then turn over in the revolving drum of the concrete mixer about one and a half minutes and then in turn this same man standing on top of the mixer would push another lever which would discharge the mixed concrete into the bucket.

Q. The hoist bucket? A. The hoist bucket. Then, on a signal from an operator, why, a bell would be rung for the engineer to start his electric motor to lift the bucket up, which in turn would come up to the floor that they were pouring concrete on, and an automatic tripper fastened on the guide would trip this bucket of concrete into a floor hopper.

Q. I will call your attention to Plaintiff's Exhibit 2, which shows the bucket, hoist bucket, apparently on the floor there. Is that the bucket and would it be at that level at the time that the mixer 320
would discharge its contents into the bucket?

Mr. McCarthy: If your Honor please, I object to this testimony, assuming a statement of facts which would have occurred at a later time, subsequent to the time——

The Court: What is the object of all this?

Mr. Mellen: The purpose of this, if your Honor please, is this: The statute with regard to filling in the floor as the building progresses makes specific exception where the openings are necessary in the construction of the work and for the handling of materials.

The Court: I understand that, but you 321
are dealing now with a completed structure and completed device.

Mr. Mellen: No, I am dealing here—here is what we are dealing with, if your Honor pleases: This hoist that we have been talking about is only one part of a series of equipment that all goes to the same purpose, the handling of the concrete to take

it from floor to floor. It is a part of the handling of material. I am showing that this panel between the panel in which the hoist was located and the bin on this same floor had to be left open because it was a necessary part of that——

Mr. McCarthy: If your Honor please, that is not so and he has not proved it. He has proved or is trying to prove that by having a man stand on top of the concrete mixer he didn't have to have anybody in that whole bay. That is what he is trying to 323 prove.

Mr. Mellen: Maybe I know better what I am trying to prove.

Mr. McCarthy: Maybe you do, but it would indicate——

The Court: Wait a moment. You did so well this morning, don't start this afternoon. I don't think what you are trying to prove as to the mixer when in a state of operation, when all these units are being used, has any relationship to this situation at the time of the death of this man.

Mr. Mellen: Your Honor, I think what I am dealing with here is this—I may be wrong: The subdivision 4 of those other 321 subdivisions of Section 241 other than 5 have relation to the concrete floor being laid as the building progresses.

The Court: Except "spaces seasonably required."

Mr. McCarthy: That is "reasonably required." That is a misprint.

The Court: I understand. "Reasonably required for proper construction of the iron

or steel and for raising, lowering of materials or for stairways, elevator shafts designated by the plans and specifications."

Mr. Mellen: We are dealing here—there can't be any doubt that concrete is a material that would be used in the construction of that building.

The Court: They weren't using it then.

Mr. Mellen: If your Honor please, if I have to put in my permanent floors——

The Court: They don't say permanent floors.

Mr. McCarthy: Floor planking. 326

Mr. Mellen: It does not say a word about planking in Section 241.

Mr. McCarthy: 241 says this, if I may read, it your Honor.

The Court: It says "thoroughly planked."

Mr. McCarthy: Planked over.

The Court: It is not the permanent floor.

Mr. Mellen: I have to do one thing at a time. There are two parts of this. If I understand that, there is no claim here made that the failure to have the cement floor is one of the grounds of negligence.

The Court: They are not talking about a cement floor.

Mr. McCarthy: Didn't say a thing about it. 327

The Court: They say the statutory violation is claimed because you didn't have that floor in that locality thoroughly planked That is not a permanent floor.

Mr. Mellen: I see the point. If that is the case, I withdraw this witness, as long

as I understand that there is no claim on the absence of centering or concrete or anything there.

Mr. McCarthy: No.

The Court: All right, that is all, sir. You may take a recess.

(The Court then recessed for five minutes.)

AFTER RECESS.

Mr. Mellen: So that there will be no question
329 in the record, do I understand that no claim is made under subdivisions 1, 2 or 3 of Section 241 of the Labor Law?

Mr. McCarthy: No claim is made under that at all.

The Court: It is embodied in 4.

Mr. Mellen: And is also made under Section 196 of the Building Code?

The Court: That is right. He confines himself to 4 of 241.

Mr. Mellen: I will offer in evidence contract between the defendant Stewart and the United States of America, through the Procurement Division of the Treasury Department, dated—I think
330 it is November 9, 1934. And I want to call attention particularly to the things that I have in mind, two sections of the specifications which by reference are made a part of the contract.

Mr. McCarthy: May I see those, please?

The Court: Yes. Show them to Mr. McCarthy first.

Mr. McCarthy: I object to those as not binding in this matter.

The Court: Is that what you have got marked "Copy" here?

Mr. Mellen: No. I will point it out to your Honor.

The Court: Is it going to be your claim that those two sections define the duty?

Mr. Mellen: It is my claim, if your Honor please, that under those two sections and within the authority of that case that I cited to you, your Honor, the United States Government through proper authority has specifically limited and exempted from application and declared a policy that those provisions are not applicable. 332

The Court: I will exclude them. I sustain the objection.

Mr. Mellen: May I, for the purpose of the record, have an offer of proof——

The Court: We will mark them for identification, those two sections. They are Division 1, Sections 21 and 22.

Mr. Mellen: Yes. I will have to substitute at a later time another copy that we can agree upon between us.

The Court: That will be agreeable.

Mr. McCarthy: Oh, yes.

The Court: There will be no trouble about that.

Mr. Mellen: They will be marked for identification? 333

The Court: Division 1, paragraphs 21 and 22.

Mr. Mellen: That is correct.

The Court: Entitled, "Protection of Public Property"—21 and 22.

Mr. Mellen: And an exception to the exclusion.

The Court: Yes.

(Considered marked Defendant's Exhibit A for Identification.)

Mr. Mellen: Defendant rests.

Mr. McCarthy: No rebuttal.

Mr. Mellen: On behalf of the defendant I renew the motion made at the close of the plaintiff's case to dismiss the complaint upon the same grounds then stated, upon the additional ground that under all of the evidence Section 241, subdivision 4 of the Labor Law imposes no duty upon the defendant under the conditions disclosed by the evidence, in that that section applies only to the floor or the tier of steel upon which the structural steel is being erected, and not to a lower floor as it is the case here, and upon the additional ground that under
335 the evidence it appears affirmatively that at the point of the accident in this particular bay was under the exclusive control at the time of the accident of the deceased's employer and himself.

The Court: Denied.

Mr. Mellen: May I also have a motion for the direction of a verdict for the defendant upon the same grounds?

The Court: Denied.

Mr. Mellen: Exception to both.

The Court: Mr. McCarthy is not going under the theory of common law at all.

Mr. McCarthy: I have withdrawn that. The particular negligence in this case is predicated directly upon subdivision 4 of Section 241 of the
336 Labor Law.

The Court: All right.

Mr. Mellen: Then, on behalf of the defendant, I renew the motion for the direction of a verdict in favor of the defendant on the specific ground that Section 241, 4 of the Labor Law is not applicable to the place of the accident and that applica-

tion thereof to the place of the accident is in violation of Article 1, Section 8 of the United States Constitution.

The Court: Denied.

Mr. Mellen: Exception.

The Court: Do you want to submit it as a question of law and fact to me without a jury? Use your own judgment. You are not offending me one way or the other. It has advantages and some disadvantages. The disadvantages are mine.

Mr. Mellen: I am willing. I would have to communicate with the attorney of record. I am sure he would approve my——

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The Court: Think it over for five minutes, and if you want to——

Mr. Mellen: I forgot that I haven't the last say. I am only trial counsel.

The Court: Do you want to consider it for awhile?

Mr. McCarthy: I would like to. I am really trial counsel in this thing, too.

(A recess was taken for a few minutes.)

AFTER RECESS.

The Court: Members of the jury: By consent of counsel, the case is going to be submitted to me without your aid. So that you may go back to the central jury part. I will dispose of it here.

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Mr. Mellen: For the purpose of the record, if your Honor please, may the defendant be permitted to reopen for the purpose of including in its proof a stipulation that on the day of the accident no steel was being erected on the floor from which the deceased fell and that the erection of steel had been

completed to a point beyond and above that floor prior to that day?

Mr. McCarthy: That is what I gathered from the evidence.

The Court: All right. That is admitted.

Mr. Mellen: Then I suppose for the record all that is necessary is for counsel to join in the motion for a direction of a verdict?

The Court: Both sides move for the direction of a verdict and that the questions of law and fact are submitted to the Court and no findings need be made.

341 Mr. Mellen: Only to this extent, if your Honor please: In the decision I would like to have it appear, in the event that there is a general finding against the defendant, whether the Court holds that the doctrine of volenti non fit injuria is applicable as a matter of law and whether or not contributory negligence is a defense as a matter of law.

The Court: I am going to hold that contributory negligence, if established, if I find it, is a bar to recovery. I will tell you that now.

Mr. Mellen: On the question whether or not there is any assumption of risk, if your Honor can determine that at the time, just so that the record will show whether that is decided as a matter of fact or as a matter of law.

342 The Court: All right. Do you want to submit a short memorandum?

Mr. Mellen: I will be delighted to.

Mr. McCarthy: I think I have about exhausted what little law I have.

The Court: Can you get one up in forty-eight hours, and especially on the assumption of risk?

Mr. Mellen: To-day is Tuesday.

The Court: There will be no court on Thursday and Friday. Monday.

Mr. Mellen: If I can have it in by Saturday or Monday morning I can do it very nicely.

The Court: Monday morning, but serve a copy on Mr. McCarthy or the attorneys on Saturday, if you will.

Mr. McCarthy: I think your Honor will take judicial notice of the expectancy of life of this plaintiff.

The Court: Yes, I will do that.

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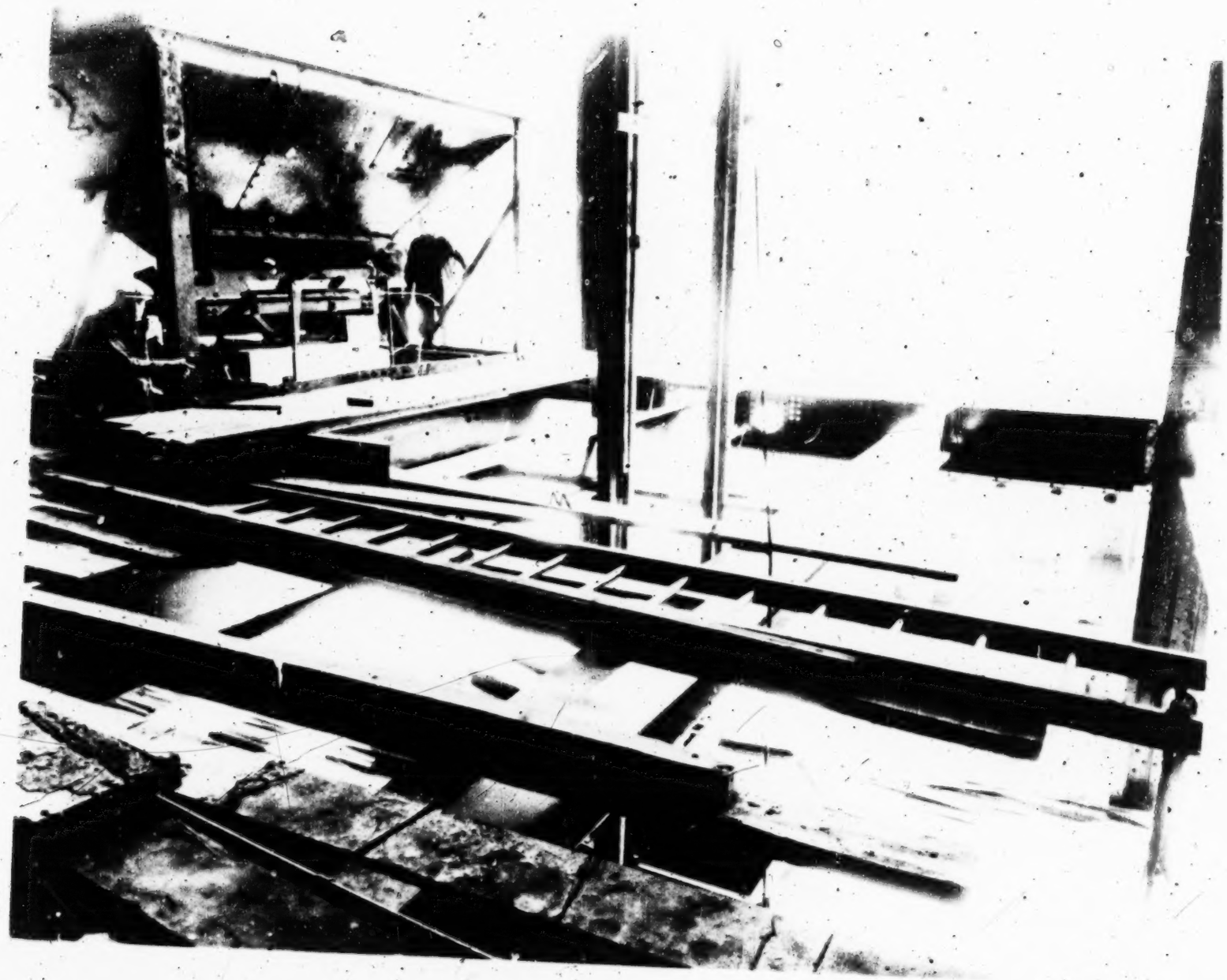
Plaintiff's Exhibit 1.

Photograph.



Plaintiff's Exhibit 2.

Photograph.

352 **Plaintiff's Exhibit 3.**

THIS AGREEMENT made and entered into this 15th day of August, 1935, in the City of New York, by and between JAMES STEWART & Co. INC., hereinafter called the Contractor, and UNITED HOISTING Co. INC., Locust Avenue and 135th Street, New York City, hereinafter called the Sub-Contractor,

WITNESSETH:

The Sub-Contractor hereby agrees to furnish and install for the use of the Contractor at the building site, as long as may be required, and to remove from the site when so ordered by the Contractor,
353 all the equipment listed below to be used in connection with the construction of the Federal Office Building for the United States Government at Barclay to Vesey Streets and Church Street to West Broadway, New York City, for which the Contractor agrees to pay the Sub-Contractor as follows:

	Delivery-Installation-Removal Charges	*Rental Charges*
MATERIAL BIN:		
1 Bin, as required, with Volumetric Batcher	$600.00	Installation Charges include 22 Wks. Rental
At the Contractor's option Sub-Contractor agrees to furnish Blaw Knox Weighing Batcher, in which case there will be added to the above	$250.00	$7.20 per wk. after 22 weeks.
CONCRETE MIXER:		
354 1 28-S Mixer on skids, equipped with batch hopper, power discharge and water tank and driven by A.C. Motor, all necessary wiring included	$200.00	$50.00 per week for 1st 6 wks. $40.06 per week for next 6 wks. $30.00 per week thereafter.
HOIST:		
1 125 HP or larger capacity as may be required A.C. Electric Single Drum Hoist with concrete bucket equipment, capacity 36 cu. ft. or greater, including necessary rigging	$119.00	$62.50 per wk.
Wiring up to 100 ft.	$ 70.00	
Wiring beyond 100 ft.	60¢ Lin. Ft.	

	Delivery-Installation-Removal Charges	*Rental Charges*
FLOOR HOPPER:		
1 32' or 65-foot (as required) collapsible floor hopper...	$ 10.00	$ 5.00 per wk.
PLATFORM HOIST:		
1 30 HP Single Drum A.C. Electric Hoist with 3-wheelbarrow platform equipment, to run the full height of the building, including all rigging and raising or lowering from time to time as required..	$112.00	$30.00 per wk.
Wiring for first 100 ft.....	$ 25.00	
Additional Wiring over 100 ft..	20¢ Lin. Ft.	

All of the above equipment is to be completely 356
installed, tested and made ready by the Sub-Contractor for the Contractor's use, and it is understood and agreed that if, in the Contractor's opinion, any or all of this equipment should prove inadequate or unsatisfactory, the Sub-Contractor shall immediately, at his own expense, remove the same and replace with other equipment satisfactory to the Contractor.

Each item of equipmem shall be installed as soon as required by the Contractor, and in the event of failure or breakdown during operation the Sub-Contractor shall make immediate repairs or replacements so that there will be no delay in the Contractor's operations. Each item shall be 357
dismantled and removed as soon as so ordered by the Contractor, and the Sub-Contractor shall immediately remove all debris caused by its workmen.

The Sub-Contractor shall be responsible for all claims for injuries to persons or property employed by the Sub-Contractor or others, or to the public, arising from defects in the Sub-Contractor's equipment or from the acts of its employees during the

progress of the work, and against such liability the Sub-Contractor shall take out and pay for proper and adequate insurance in amounts of not less than $50,000 100,000 limits, certificates of which shall be filed by the Sub-Contractor with the Contractor. The Sub-Contractor shall also take out and pay for Workmen's Compensati n Insurance, certificates of which shall also be filed with the Contractor.

It is understood and agreed that all of the above prices are subject to a cash discount of 2% for payment within ten (10) days after receipt of in-
359 voices for amounts due to preceding month.

In Witness Whereof, the parties hereto have set their hands and seals this 15th day of August, 1935.

JAMES STEWART & COMPANY, Inc.
(Seal) By (signed) Harry D. Watts,
Vice President.

Witness:

(Signed) C. J. Schneider

UNITED HOISTING CO. Inc.
(Seal) By (signed) Edward A. White,
360 President.

Witness:

(Signed) J. M. Clements

Defendant's Exhibit A for Identification. 361

Contract between James Stewart & Co., Inc., and the United States of America, Treasury Department, Procurement Division, dated November 9, 1931, referred to in paragraph "Second" of the Amended Complaint, in which said James Stewart & Co., Inc., is described as "the contractor," contained the following provisions, among others:

"21. PROTECTION OF PUBLIC AND PROPERTY. —The contractor shall protect all materials and work, whether incorporated in the building or not, against injury from any cause, and shall provide and maintain all necessary guards, lights, etc., for the protection of the 362
public, and he shall comply with all Municipal ordinances which apply to the use of sidewalks and streets or alleys for building operations, but such ordinances do not apply inside of the lot lines. He shall be held responsible for any damage or injury to persons or property which may occur as a result of his fault or negligence in the prosecution of the work.

"22. PERMITS.—The contractor shall without additional expense to the Government obtain all required licenses, permits, etc. This applies to work outside the lot lines, the use of streets and sidewalks, the protection of public and traffic, connections to utility service 363
lines, etc. State or Municipal Building Regulations do not apply to work inside the Government's lot lines."

364 **Statement as to Evidence.**

The foregoing case contains all of the evidence adduced and proceedings had upon the trial of this action, together with the exceptions of both sides taken on said trial.

Corrected Opinion by Lewis, J., Dated November 30, 1937.

SUPREME COURT,

TRIAL TERM—PART VIII.

365

BY MR. JUSTICE LEWIS.

Sadrakula, as adm'x, &c., v. James Stewart & Co., Inc., and ano. (corrected)—Action by the plaintiff against the general contractor, James Stewart & Co., Inc., for damages resulting from the death of her husband, an employee of a subcontractor. The proximate cause of the accident which occasioned decedent's death was the failure of the defendant to thoroughly plank over the beams as required by section 241, subdivision 4, of the Labor Law. The defense of assumption of risk is not maintainable where, as here, the relationship of master and servant did not exist. There was likewise a failure to establish that plaintiff's decedent was guilty of any contributory negligence. I direct judgment in favor of the plaintiff for the sum of $23,125.

366

LEWIS,
J. S. C.

Stipulation Settling Case.

367

IT IS HEREBY STIPULATED that the foregoing record contains all the evidence given upon the trial of this action, together with the exceptions of both sides taken on said trial, and that the same be settled and ordered on file as the case on appeal and annexed to the judgment roll herein.

Dated, New York, February 10, 1938.

FREDERICK MELLOR,
Attorney for Defendant-Appellant.

McCARTHY, FIXLER & STEWART,
Attorneys for Plaintiff-Respondent. 368

Order Settling Case.

On the above stipulation, I HEREBY CERTIFY that the foregoing record contains all of the evidence adduced and proceedings had upon the trial of this action, together with exceptions of both sides taken on said trial, and said case is hereby settled and ordered on file as the case on appeal in this action.

Dated, New York, February 14, 1938.

HARRY E. LEWIS, 369
J. S. C.

370 **Stipulation Waiving Certification.**

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, judgment roll and case and exceptions as settled, and of the whole thereof, now on file in the office of the Clerk of the County of Kings, and that certification thereof by the Clerk of said County, pursuant to Section 616, is hereby waived.

Dated, New York, February 10, 1938.

FREDERICK MELLOR,
Attorney for Defendant-Appellant.

371

McCARTHY, FIXLER & STEWART,
Attorneys for Plaintiff-Respondent.

Order Filing Record in Appellate Division.

Pursuant to Section 616 of the Civil Practice Act, it is

ORDERED that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the Second Department.

372

Dated, New York, February 14, 1938.

HARRY E. LEWIS,
J. S. C.

Notice of Appeal to Court of Appeals.

SUPREME COURT,

KINGS COUNTY.

KATHERINE SADRAKULA, as Admx. of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Plaintiff-Respondent.

against

JAMES STEWART & Co., INC.,
Defendant-Appellant.

Sirs:

PLEASE TAKE NOTICE that the defendant, James Stewart & Co., Inc., hereby appeals to the Court of Appeals of the State of New York from the judgment entered herein in the office of the Clerk of the County of Kings on or about the 27th day of June, 1938, for the sum of $95.97 costs and affirming the judgment entered herein in the office of the Clerk of Kings County on or about the 24th day of November, 1937, in favor of the plaintiff and against the defendant, for the sum of $26,197.08, and affirming also an order made by the Court denying the defendant's motion for a new trial, and the said defendant, James Stewart & Co., Inc., will bring up for review upon said appeal, the order of the Appellate Division of the Supreme Court, Second Judicial Department, dated June 17, 1938, upon which said judgment of affirmance was entered, and the said defendant hereby appeals from

376 *Notice of Appeal to Court of Appeals.*

each and every part of said judgment and order, as well as from the whole thereof.

Dated, New York, N. Y., August 23, 1938.

Yours, etc.,

FREDERICK MELLOR,
Attorney for Defendant-Appellant,
No. 60 John Street,
Borough of Manhattan,
New York City, N. Y.

377 To:

CLERK OF THE COUNTY OF KINGS.

McCARTHY, FIXLER & STEWART,
Attorneys for Plaintiff-Respondent,
165 Broadway,
Borough of Manhattan,
New York, N. Y.

378

Order of Affirmance.

379

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department, at the Borough of Brooklyn, on the 17th day of June, 1938.

Present,—Hon. Edward Lazansky,
Presiding Justice,
" William F. Hagarty,
" William B. Carswell,
" Rowland L. Davis,
" George H. Taylor, Jr.,
Justices.

380

Katherine Sadrakula, as administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased, Respondent, against James Stewart & Co., Inc., Appellant.	Order on Appeal from Judgment.

381

The above-named James Stewart & Co., Inc., the defendant in this action, having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Kings on the 24th day of November, 1937, herein, and the said appeal having been argued by Mr. Clarence E. Mellen, of counsel for the appellant, and argued by Mr. Leo Fixler, of counsel for the respondent, and due deliberation having been had thereon,

382 *Order of Affirmance.*

IT IS ORDERED AND ADJUDGED that the judgment so appealed from be and the same hereby is unanimously affirmed, with costs.

Enter,

E. L.,
P. J.

Judgment of Affirmance.

SUPREME COURT

383 OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

KATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Plaintiff,

against

JAMES STEWART & CO., INC.,
Defendant.

384

The above named defendant, James Stewart & Co., Inc., having appealed to the Appellate Division, Supreme Court, Second Department, from the judgment of the Supreme Court entered in the office of the Clerk of the County of Kings on the 24th day of November, 1937, in favor of the plaintiff and

against the defendant for the sum of Twenty-six Thousand One Hundred Ninety-seven and 08/100 ($26,197.08) Dollars, and the said Appellate Division of the Supreme Court having rendered its decision unanimously affirming said judgment with costs to the plaintiff, and a certified copy of the order of the Appellate Division having been duly filed, together with the record in the office of the Clerk of the County of Kings, and said costs having been duly taxed by the Clerk of the Court,

Now, on motion of McCarthy, Fixler & Stewart, attorneys for the plaintiff, it is 386

ORDERED AND ADJUDGED, that the judgment so appealed from be and the same is hereby in all things confirmed, and it is further,

ADJUDGED, that the plaintiff, Katherine Sadrakula, as administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased, recover from the defendant, James Stewart & Co., Inc., the sum of $95.97/100, the cost of said appeal, and that the plaintiff have execution therefor.

Judgment signed and entered this 27th day of June, 1938.

JOHN N. HARMAN, 387
Clerk.

388 **Order on Motion for Leave to Appeal.**

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twenty-ninth day of November, A. D. 1938.

Present:

HON. FREDERICK E. CRANE,
Chief Judge, presiding.

389

KATHERINE SADRAKULA, as Admrx., &c., of Nicholas Sadrakula, deceased,
Respondent,

vs.

JAMES STEWART & CO., INC.,
Appellant.

A MOTION for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and
390 papers having been duly submitted thereon, and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements on the ground that an appeal has been properly taken as of right.

A Copy

RUFUS KIMBALL,
Deputy Clerk.

Memorandum of Appellate Division, Second Department. 391

SUPREME COURT,

APPELLATE DIVISION—SECOND DEPARTMENT.

KATHERINE SADRAKULA, as Administratrix, etc., of Nicholas Sadrakula,

Respondent,

vs.

JAMES STEWART & CO., INC.,

Appellant.

392 PRESENT—Lazansky, P. J., Hagarty, Carswell, Davis and Taylor, Jr., JJ.

Action for damages for the death of plaintiff's decedent as a consequence of a violation by the defendant of Section 241, subdivision 4, Labor Law, in the course of the erection of a Federal post office building.

Judgment for plaintiff unanimously affirmed, with costs. (a) The evidence adequately established that the proximate cause of the decedent's death was defendant's failure to plank over the steel beams in the western area of the "bay" as required by Section 241, subdivision 4, Labor Law. (b) The labor law provision was in effect at the place of the accident because that statute was 393 enacted prior to the acquisition of the property by the Federal Government. The common law and statutes in effect before the act of cession remain in force until displaced by Congress (Kaufman v. Hopper, 220 N. Y. 184, 187, 115 N. E. 470, and cases cited therein). There has been no action by Congress displacing the Labor Law in respect of this Federal reservation. Such Federal action as has taken place is confirmatory of plaintiff's right to invoke the applicable State statutes (45 Stat. 54, tit. 16, U. S. Code, sec. 457).

394 **Waiver of Certification in Court of Appeals.**

Pursuant to Section 170 of the Civil Practice Act,

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the preceding papers, as hereinbefore printed, consist of true and correct copies of the notice of appeal to the Court of Appeals, the order of affirmance and the judgment of affirmance appealed from, the order on motion for leave to appeal and the printed record upon which the Appellate Division acted in making the order of affirmance, and the whole thereof, now on file in the office of the Clerk of the County of Kings.

395 Certification thereof, in pursuance of Section 616 of the Civil Practice Act, is hereby waived.

Dated, New York, December , 1938.

FREDERICK MELLOR,
Attorney for Defendant-Appellant.

MCCARTHY, FIXLER & STEWART,
Attorneys for Plaintiff-Respondent.

396

[fol. 133] **IN COURT OF APPEALS OF NEW YORK**

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany on the 4th day of April in the year of our Lord one thousand nine hundred and thirty nine before the judges of said Court

Witness

The Hon. Frederick E. Crane, Chief Judge Presiding.
John Ludden, Clerk.

KATHERINE SADRAKULA as Admrx., etc., Respondent

ag'st

JAMES STEWART & Co., INC., Appellant

REMITTITUR—April 5, 1939

Be It Remembered, That on the 9th day of January in the year of our Lord one thousand nine hundred and thirty-nine, James Stewart & Co., Inc., the appellant in this cause came here unto the Court of Appeals by Frederick Mellor, its attorney and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Katherine Sadrakula as administratrix etc. the respondent in said cause afterward appeared in said Court of Appeals by McCarthy, Fixler & Stewart her attorneys.

Which said Notice of Appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon, The Said Court of Appeals having heard this cause argued by Mr. Clarence E. Mellen, of counsel for the appellant and by Mr. Leo Fixler, of counsel for the [fol. 134] respondent and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court be remitted to the Said Supreme Court there to be proceeded upon according to law.

And afterwards, to wit on the 21st day of April, 1939, an order was duly made amending the remittitur herein, a

certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto as aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York, Court of Appeals, Clerk's Office, Albany, April 5, 1939.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal of the Court of Appeals, State of New York.)

[fol. 135] In Court of Appeals of New York

[Title omitted]

Order Amending Remittitur—April 21, 1939.

A motion to amend the remittitur in the above cause having been heretofore made herein upon the part of appellant, papers having been submitted in support of said motion and in opposition thereto and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and remittitur amended by adding thereto the following:

"A question under the Federal Constitution was presented and necessarily passed upon by this Court. The appellant contended that Section 241, sub-division 4 of the Labor Law of the State of New York (Consolidated Laws

of New York, Chapter 31, Section 241, sub-division 4) insofar as the said law is construed to apply to the construction and erection of a post office building pursuant to a contract with the Treasury Department of the United States, upon land within the exterior boundaries of the State of New York but which is within the exclusive jurisdiction of the United States under Article 1, Section 8, Clause 17 of the Constitution of the United States, is repugnant to the Constitution and laws of the United States in that it offends Article 1, Section 8 of the Constitution of the United States and Title 40 U. S. Code, Sections 285, 341 and 342 (30 U. S. Stat. 614; 44 U. S. Stat. 630, 631) and is invalid when so applied.

This Court held that the aforesaid Labor Law of the State of New York is valid and not repugnant to any provision of the Constitution of the United States."

And, the Supreme Court, Kings County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Rufus Kimball, Deputy Clerk.

A copy.

[fol. 136] In Supreme Court of New York, County of Kings

Present: Hon. Edward Riegelmann, Justice.

Katherine Sadrakula, as Administratrix of the Goods, Chattels and Credits Which Were of Nicholas Sadrakula, Deceased, Plaintiff,

vs.

James Stewart & Co. Inc., Defendant

Order on Remittitur—April 10, 1939

Upon reading the annexed affidavit of Leo Fixler, Esq., of counsel for McCarthy, Fixler & Stewart, the attorneys for the plaintiff herein, duly sworn to the — day of April, 1939, and upon all the proceedings and pleadings heretofore had herein, and upon the remittitur of the Court of Appeals filed in the office of the Clerk of the County of Kings, on the 10th day of April, 1939, which remittitur is

dated April 5th, 1939 and the certified copy of the judgment and order of the Court of Appeals attached to and — part of the said remittitur, it is hereby

Ordered, Adjudged and Decreed, that the said judgment and order of the Court of Appeals be and the same is hereby made the judgment and order of this Court.

Enter.

E. R., J. S. C.

Granted April 10th, 1939. John N. Harman, Clerk.

[fol. 137] In Supreme Court of New York, County of Kings

[Title omitted]

Affidavit of Leo Fixler

Leo Fixler, being duly sworn, deposes and says:

That he is an attorney associated with the firm of McCarthy, Fixler & Stewart, the attorneys for the plaintiff herein.

That this is an action to recover damages for the wrongful death of plaintiff's decedent.

That after a trial before Hon. Justice Harry E. Lewis, a verdict was rendered in favor of the plaintiff and judgment entered thereupon.

That thereafter the defendant appealed to the Supreme Court, Appellate Division, Second Department and as a result of said appeal, the judgment in favor of the plaintiff was affirmed.

That thereafter, the defendant by its attorney, appealed to the Court of Appeals.

That as a result of such appeal, the Court of Appeals affirmed said judgment and order with costs.

That the remittitur of the Court of Appeals is dated April 5th, 1939 and said remittitur, together with certified [fol. 138] copy of the order and judgment of the Court of Appeals was filed in the office of the Clerk of the County of Kings on the 10th day of April, 1939.

Wherefore, deponent respectfully prays that the annexed order rendering the judgment and order of the Court of Appeals, the judgment and order of this Court be signed.

No previous application for the relief prayed for herein has been made.

Leo Fixler.

Sworn to before me this 10th day of April, 1939.
Edward J. Pacelli, Notary Public, Kings County.

[fol. 139] In Supreme Court of New York, County of Kings

Katherine Sadrakula, as Administratrix of the Goods, Chattels and Credits Which Were of Nicholas Sadrakula, Deceased, 148 No. 9th St., B'klyn, Plaintiff,

vs.

James Stewart & Co. Inc., 230 Park Ave., N. Y. C., Defendant

Judgment on Remittitur—April 13, 1939

The above named defendant, James Stewart & Co. Inc., having appealed to the Court of Appeals from the order and judgment of affirmance of the Appellate Division of the Supreme Court in and for the Second Department, which judgment was entered in the office of the Clerk of the County of Kings on the 27th day of June, 1938, and the said Court of Appeals having rendered its decision affirming the said judgment and order with costs to the plaintiff-respondent and a certified copy of the order of the said Court of Appeals having been duly filed together with the record in the office of the Clerk of the County of Kings and an order having been granted on the 10th day of April, 1939, rendering the order and judgment of the Court of Appeals, the order and judgment of this Court, and said costs having been duly taxed by the Clerk of this Court,

Now, on motion of McCarthy, Fixler & Stewart, attorneys for the plaintiff, it is

Ordered and Adjudged, that the judgment and order so appealed from be and the same hereby are in all things affirmed and it is further

Adjudged that the plaintiff, Katherine Sadrakula, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased, recover of the de-

fendant, James Stewart & Co. Inc., the sum of $138.53, [fol. 140] costs of said appeal, and that the plaintiff have execution therefor.

Judgment Signed and Entered This 13 Day of April, 1939.

John N. Harman, Clerk.

[fol. 140½] Sir:

Please take notice that the within is a true copy of a judgment this day made and entered herein in the office of the Clerk of this Court.

Dated, N. Y., April 13th, 1939.

Yours, etc., McCarthy, Fixler & Stewart, Attorneys for Plaintiff, Office and Post Office Address, 165 Broadway, Borough of Manhattan, New York City.

To Frederick Mellor, Esq., Attorney for Defendant.

Due and timely service of a copy of the within Judgment is hereby admitted.

Dated, N. Y., April 13, 1939.

[Name illegible], Attorney for ——.

[fol. 141] Supreme Court of the United States

[Title omitted]

Petition for Appeal

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioner, James Stewart & Co., Inc., respectfully shows:

Petitioner is the appellant in the above entitled action.

Appellee, Katherine Sadrakula, as administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased, commenced this action in the Supreme Court of the State of New York, Kings County, on January 16, 1936, under the New York Decedent Estate Law, Section 130, (Consolidated Laws of New York, Chapter 13, Section 130) to recover damages for the death of her intestate [fol. 142] through the alleged negligence of appellant. Issue was joined therein and a jury having been waived, the

action was tried by the Court and a decision was rendered in favor of appellee (plaintiff below) upon which, on November 24, 1937, judgment was duly entered against appellant in the sum of $26,197.08.

Upon the trial, it was conceded that appellee's intestate died on October 24, 1935, as a result of injuries received that day, in falling to the sub-basement floor, from the basement floor, of a post office and federal office building, which appellant, as general contractor, was constructing pursuant to a contract with the Treasury Department of the United States, upon land owned by the United States.

It was also conceded that this land had been purchased by the United States in 1931, in separate parcels, at private sale, with the consent of the Legislature of the State of New York, for the purpose of erecting thereon a necessary post office and office building. Exclusive jurisdiction thereof was ceded to the United States by Consolidated Laws, Chapter 57, Sections 50, 53 (State Law, Sections 50, 53).

[fol. 143] Appellant's alleged liability for the death of appellee's intestate was predicated upon the sole ground that his death was proximately caused by appellant's failure to comply with the Labor Law of the State of New York, Section 241, subdivision 4 (Consolidated Laws of New York, Chapter 31, Section 241) by having the tier of beams at the floor level from which he fell "thoroughly planked over". The pertinent part of that statute, as in effect from and after April 19, 1930, read:

"Protection of Employees on Building Construction or Demolition Work. All contractors and owners, when constructing or demolishing buildings, shall comply with the following requirements: * * *

4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces seasonably required for proper construction of the iron or steel work, for raising or lowering of material or for stairways and elevator shafts designated by the plans and specifications."

Appellant raised the question of the applicability of that statute to the place where the accident occurred upon the

ground that that building was being constructed for the United States, upon land which was within the exclusive [fol. 144] jurisdiction of the United States, and claimed that if said statute of the State of New York were applied thereto it would violate Article 1, Section 8 of the Constitution and the Laws of the United States. That question was presented at the trial by appellant's motions to dismiss appellee's complaint and for the direction of a verdict in its favor. The decision of the Supreme Court of the State of New York, Kings County, was in favor of the applicability of said New York statute to said Federal work in Federal territory and of the validity thereof when so applied.

Appellant thereupon appealed from said judgment to the Appellate Division of the Supreme Court of the State of New York, Second Department, and in its brief and argument therein again urged that such application of the New York Labor Law was repugnant to the Constitution and Laws of the United States. The decision of the said Appellate Division of the Supreme Court, Second Department, was in favor of the validity of said State statute when so applied and its judgment of affirmance of said judgment against appellant was duly entered on June 27, 1938.

[fol. 145] Appellant then appealed to the Court of Appeals of New York, as of right, pursuant to Section 588, subdivision 1 of the New York Civil Practice Act upon the ground that the judgment appealed from was entered upon a decision in an action wherein "the construction of the Constitution of the United States" was "directly involved".

In its briefs and argument in the New York Court of Appeals, appellant again contended that the application of the New York Labor Law in this case was repugnant to the Constitution and Laws of the United States, but the Court of Appeals decided in favor of the validity thereof and has affirmed the judgment against appellant and decided that the New York Labor Law, Section 241, subdivision 4 was properly applied to the construction of a building for the United States, in a place within the exclusive jurisdiction of the United States and is not repugnant to the Constitution and Laws of the United States when so applied.

The Remittitur of the Court of Appeals, as amended, has been filed with the Clerk of the Supreme Court in Kings County and the judgment of the Court of Appeals made the

judgment of the Supreme Court by judgment filed on the 13th day of April, 1939.

[fol. 146] The Court of Appeals is the highest Court of the State of New York in which a decision in this case can be had. There is drawn in question the validity of a statute of the State of New York on the ground that said statute is repugnant to the Constitution and Laws of the United States, and the decision is in favor of the validity of said statute notwithstanding your petitioner's contention that as applied and enforced in this cause, said statute violates Article 1, Section 8 of the Constitution of the United States and United States Code, Title 40, sections 285, 341, 342 (30 Stat. 614; 44 Stat. 630, 631.)

That, therefore, in accordance with Section 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928 was passed, to wit, under Section 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment [fol. 147] of errors, filed herewith, pursuant to Rules 9 and 46(2) of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12(1) and 46(2) of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Court of Appeals of the State of New York, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of New York may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of New York, County of Kings, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the supersedeas bond tendered by the peti-

[fol. 148] tioner be approved and that the said appeal may operate as a supersedeas.

Dated, June 16th, 1939.

Clarence E. Mellen, Frederick Mellor, Attorneys for Petitioner.

[fol. 149] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The appellant assigns the following errors in the record and proceeding in this case:

1. The State Court erred in holding that New York Labor Law, Section 241, subdivision 4 (Consolidated Laws of New York, Chapter 31, Section 241, subdivision 4) when applied to a post office building which is being erected for the United States, in a place which is within the exclusive jurisdiction of the United States, is valid and does not violate the provisions of Article 1, Section 8, of the Constitution of the United States.

2. The State Court erred in holding that New York Labor [fol. 150] Law, Section 241, subdivision 4 (Consolidated Laws of New York, Chapter 31, Section 241, subdivision 4) when applied to a place which had been purchased by the United States, with the consent of the Legislature of said State, for the purpose of erecting needful buildings thereon and as to which said State had ceded exclusive jurisdiction to the United States, is valid and does not violate the provisions of Article 1, Section 8 of the Constitution of the United States.

3. The State Court erred in holding that the said New York Labor Law, Section 241, subdivision 4, when so applied as to control and restrict the manner and method of constructing a post office building owned by the United States, is valid and does not violate Article 1, Section 8 of the Constitution of the United States, and United States Code, Title 40, Sections 285, 341 and 342 (30 Stat. 614; 44 Stat. 630, 631).

4. The State Court erred in holding that appellant violated Section 241, subdivision 4 of the said New York Labor Law.

5. The State Court erred in holding that the death of appellant's intestate was caused by a violation of Section 241, subdivision 4 of the said New York Labor Law.

[fol. 151] 6. The State Court erred in holding that Defendant's Exhibit A for Identification, a part of the contract between appellant and the United States, containing a provision that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines" was properly excluded from evidence when offered by appellant.

Wherefore, on account of the errors hereinbefore assigned, appellant prays that the said judgment of the Court of Appeals and the said judgment of the Supreme Court of the State of New York, entered thereupon in the above entitled cause on the 13th day of April, 1939, be reversed, and judgment directed to be entered in favor of the appellant.

Dated, June 16, 1939.

Clarence E. Mellen, Counsel for Appellant.

[fol. 152] Supreme Court of the United States

[Title omitted]

Order Allowing Appeal

The petition of James Stewart & Co., Inc., the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of New York, entered upon the remittitur of the Court of Appeals of the State of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and prayer for reversal, and statement as to jurisdiction, all as provided by the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from a final judgment [fol. 153] dated the 13th day of April, 1939, of the Supreme Court of the State of New York, as prayed in said petition,

and that the Clerk of the Supreme Court of the State of New York, in the County of Kings, shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said court, a true copy of the material parts of the record herein, which shall be designated by a praecipe or stipulation of the parties, or their counsel herein, all in accordance with the Rules of the Supreme Court of the United States.

It Is Further Ordered that the said appellant shall give a good and sufficient bond, in the sum of Thirty-two Thousand, Five Hundred Dollars ($32,500), that said appellant shall prosecute said appeal to effect and answer all damages and costs if he fail to make his plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

Dated, June 22nd, 1939.

(Signed) Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 154] Citation in usual form showing service on McCarthy, Fixler & Stewart filed June 22, 1939, omitted in printing.

[fol. 155] Supersedeas bond on appeal for $32,500.00 approved June 22, 1939, omitted in printing.

[fol. 156] Supreme Court of the United States

[Title omitted]

Stipulation as to Transcript of Record

It Is Hereby Stipulated by counsel for both sides in the above cause that the Clerk in making up the transcript shall follow the papers and records as shown in the return and transcript on file in the Court of Appeals and in the Supreme Court of the State of New York, making the order and judgment of the Court of Appeals the judgment of said Supreme Court, together with papers filed by the authority

of Rule 12 of the Rules of the Supreme Court of the United States without omission or addition.

Dated, June 22nd, 1939.

Clarence E. Mellen, Frederick Mellor, Attorneys for Appellant. McCarthy, Fixler & Stewart, Attorneys for Appellees.

[fol. 157] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD Filed Aug. 1, 1939

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated, New York, July 31, 1939.

Clarence E. Mellen, Counsel for Appellant.

Service of a copy of the within statement admitted this 31 day of July, 1939.

McCarthy, Fixler & Stewart, Attorneys for Appellees.

[fol. 158] [File endorsement omitted.]

Endorsed on cover: File No. 43,658. New York, Supreme Court. Term No. 251. James Stewart & Co., Inc., Appellant, vs. Katherine Sadrakula, as Administratrix of the Goods, Chattels and Credits which were of Nicholas Sadrakula, Deceased. Filed August 1, 1939. Term No. 251, O. T., 1939.